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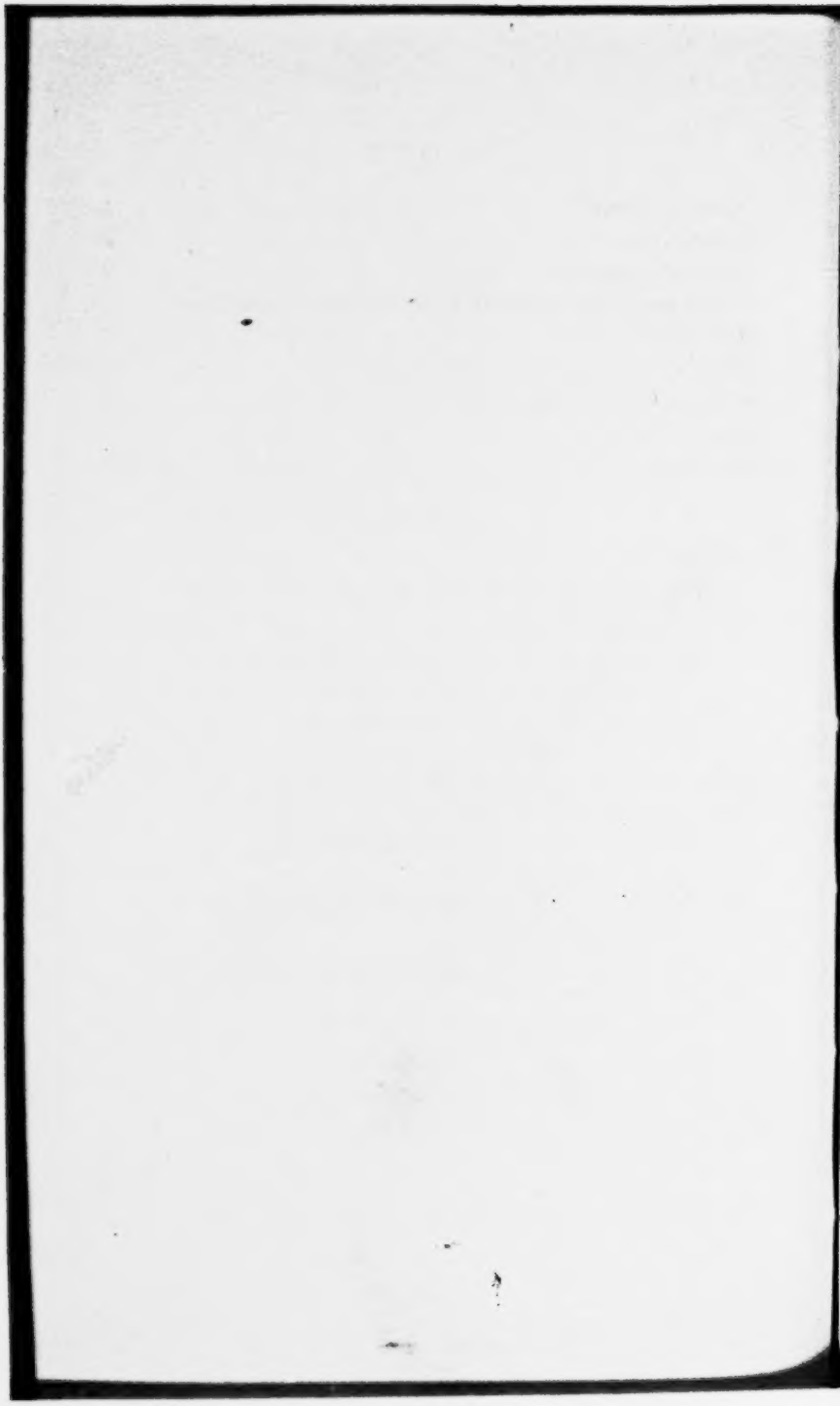

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1951

H. B. ZACHRY COMPANY, PETITIONER,

versus

T. N. TERRY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT

Petitioner, H. B. Zachry Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on March 22, 1952. Petition for rehearing was denied on April 18, 1952.

OPINIONS BELOW

The memorandum decision of the District Court appears in the Record at pp. 76-93. Findings of Fact and Conclusions of Law, and the Judgment of the District Court, are printed in the Record. (R. 978-997, 950-951.) The opinion of the Court of Appeals is not yet reported, but is printed in the Record. (R. 1019-1034).

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on March 22, 1952. Petition for rehearing was filed April 7, 1952, and order denying the same was entered on April 18, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

Petitioner's constitutional right to trial by jury of all legal issues made, joined and determined in the action.

CONSTITUTION AND FEDERAL RULES OF CIVIL PROCEDURE

The Seventh Amendment to the Constitution of the United States, and the applicable parts of the Federal Rules of Civil Procedure involved, are set out in the Appendix, infra pp. 21-22.

STATEMENT

Respondent, T. N. Terry, declared upon a written contract of employment dated June 10, 1946, alleging performance, demand for payment thereunder, and that the contract terminated on June 28, 1949. He sought to recover the aggregate of $3,300.00 as salary at the rate of $150.00 per month which he said had not been paid; and in addition, a sum of money in excess of $50,000.00 alleged to be due him from Petitioner's farm operations under the terms of the contract. Respondent further asserted he had no adequate remedy at law; that Petitioner occupied a fiduciary relationship toward him; that he was entitled to an accounting and reasonable attorney's fees under Article 2226, Revised Civil Statutes of Texas; that he requested of Petitioner a statement reflecting the net

profits derived from its farming operations for the years 1946 to 1949; that such statement was furnished but the same was not correct, in that various charges appearing therein had been eliminated either by prior interpretations of the contract, or by prior oral agreements, or by subsequent oral agreements, or, in some instances, certain charges were not proper because a certain phrase in the contract was ambiguous, and that such phrase should carry a construction that would eliminate certain specific items of cost. (R. 53-61, 102-113.)

Petitioner joined issues by its pleadings (R. 68-75, 94-101, 117-118,) and made demand for a jury under Rule 38 of the Federal Rules of Civil Procedure. (R. 30.)

Respondent filed a motion to strike the jury demand, and to declare the action equitable in character, with all issues triable to the Court without the intervention of a jury. (R. 40.) The District Court accordingly so ordered. (R. 84.)

At commencement of the trial, Petitioner *renewed* its request for trial by jury of all issues made and joined by the pleadings, but the Court adhered to its former ruling and proceeded to trial on the issues without the intervention of a jury. (R. 151.)

The District Court made extensive Findings of Fact and Conclusions of Law (R. 978,) and entered Judgment against Petitioner in favor of Respondent in the amount of $52,864.49, with interest thereon at the rate of six percent (6%) per annum from April 25, 1951 until paid. (R. 950-951.)

When the pleadings are squared, the question of an accounting does not exist, but the following issues are presented and joined:

1) Whether Respondent performed under the terms of the contract, as alleged in his Complaint. (R. 53.)

2) Whether Petitioner owed Respondent the salary alleged to be due under the terms of the contract. (R. 56.)

3) Did Petitioner and Respondent make a prior or subsequent agreement eliminating certain expense items provided for in the contract, as alleged in paragraphs 5(a), 6(a), 6(c), 1,2 of the Complaint? (R. 55-58.)

4) Did Petitioner and Respondent enter into an oral agreement subsequent to the date of the contract sued on, to eliminate the charge of $1,000.00 for 50 acres of land planted in carrots, as alleged in paragraph 9(a) of the First Amendment to the Amended Complaint? (R. 102.)

5) Did Petitioner agree, in May of 1948, to delete certain charges to crop cost, as alleged in paragraph 9(b) of Amendment to First Amended Complaint, and paragraph B of Respondent's More Definite Statement? (R. 102 and 109, respectively.)

6) Was there such an agreement as described in paragraph 9(d) of the Amended Complaint? (R. 103.)

7) Did Petitioner agree with Respondent to delete the expense items described in paragraph 9(f) of the Amended Complaint, and paragraph F of the More Definite Statement? (R. 104 and 112, respectively.)

8) Did Petitioner and Respondent enter into an agreement subsequent to the date of the contract sued on, regarding the planting of 400 acres of milo maize, as alleged in paragraph 9(e) of the Amended Complaint,

and in the More Definite Statement? (R. 104 and 112, respectively.)

9) What is the meaning of "applicable direct costs," since Respondent alleged that such term was ambiguous? (R. 105-106.)

10) What are reasonable attorney's fees? (R. 60.)

Thus the situation of the pleadings at commencement of the trial of the suit; and thus the situation when Petitioner *renewed* its request for a jury trial upon the issues made and presented (R. 151); and thus the situation when the District Court foreclosed Petitioner's right to a trial by jury on the issues made and presented, on the ground that the action was equitable in character, giving the District Court the right to try and determine all issues; and thus the situation when the District Court, by its Findings of Fact, found against Petitioner on all of the *controverted issues of fact;* and thus the situation when the Honorable Court of Appeals ruled that Petitioner had no right to a jury trial of the legal issues presented by the pleadings, and determined by the Trial Judge.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1) In holding that Petitioner is not entitled to a jury trial of all the legal issues made and joined by the pleadings and the evidence, contrary to the spirit of Rules 2, 38(a), 38(b), 39(a) and 42(b) of the Federal Rules of Civil Procedure, and the Seventh Amendment to the Constitution of the United States, which preserve the right of trial by jury in civil actions as at common law.

2) In holding that Respondent's suit is one for an

accounting, when his Complaint (R. 54-56, paragraph 5(a) therein,) shows that a statement of the farm account had been submitted prior to suit, pursuant to his request, and Petitioner's farm account having been set forth in its Answer (Fifth Defense, paragraph III, R. 73,) and the Stipulations (R. 95,) leaving only the legal issues presented and formulated by the Complaint and the further pleadings of the parties.

3) In holding in effect that, because the accounting factor was injected into the case, the District Court acquired exclusive equity jurisdiction, and therefore empowered to determine all fact issues, legal and equitable, contrary to the Federal Rules of Civil Procedure, and the Seventh Amendment to the Constitution of the United States.

4) In holding that the John Deere Tractor owned by Petitioner and described in the Trial Court's Finding of Fact No. 4 (R. 987,) should be sold and one-half of the proceeds paid to Respondent, since nowhere in the Record, nor in the contract sued on, does it appear that Respondent had or has an interest, legal or equitable, in said item of equipment, or in any other piece of equipment belonging to Petitioner.

5) In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1) The question, so far as we are able to determine, has never been directly and squarely passed on by this Court since the adoption of the Federal Rules of Civil Procedure. The question has been indirectly determined, though, in cases dealing with appealability of orders striking jury demands. The question is of the utmost importance to the jurisprudence of the United States,

because there is still confusion in the minds of the members of the bar, as well as in the minds of the Courts, concerning the right of trial by jury in civil actions where legal and equitable remedies are joined pursuant to Rule 2 of the Federal Rules of Civil Procedure. We believe it can be reasonably presumed that a majority of the lawyers practicing in the United States, including the Judges of the District Courts and the Courts of Appeals, would desire to have this Court determine the question presented in this petition.

All civil actions filed in or presented to the United States District Courts are subject to the mandate of this Court as expressed in the Federal Rules of Civil Procedure requiring consolidation of all claims, legal and equitable, in a single civil action. The question that immediately presents itself to counsel on either side is—what will happen to his clients' right to trial by jury on legal issues where legal and equitable remedies are joined in the same action? He has consulted the Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States, several text books, and all of the court cases on the subject, and has come up with the answer that all legal issues remain triable to a jury if demand be made therefor, while equitable issues may be disposed of by the Court. He then makes timely demand for a jury to try the legal issues, according to Rule 38(b) of the Federal Rules of Civil Procedure, but is met with a motion to strike the jury demand, on the ground that the action is equitable in character because plaintiff prayed for an accounting, and that none of the issues are triable to a jury—that it is strictly a court action. The Trial Court then determines the action to be equitable in character, and strikes the jury demand, and proceeds to

dispose of all issues, just as was done in the instant case.

The result is that confusion reigns at the bar, leading to expensive appeals. This situation will continue to exist until this Court puts the question at rest.

The case most nearly in point, since promulgation of the Federal Rules of Civil Procedure, came out of the Fifth Circuit in 1942, being *Barnett v. New England Mutual Life Insurance Co.*, 123 F.2d 712. Another case very close in principle to the instant case is *Ring v. Spina* (2nd Cir., 1948) 166 F.2d 546. There are others, but they will be taken up as we progress with the reasons for granting the writ.

Clearly, the question presented is of great importance to the bar of the United States and to all who may seek justice in its Courts. The question involves the construction of the applicable Federal Rules of Civil Procedure on the joinder of legal and equitable claims without the loss of the right of trial by jury. It not only involves Petitioner's right to trial by jury of all legal issues presented and determined in this case, but the right of all litigants in the Federal Courts of the United States, upon demand, to trial by jury of all legal issues made and presented by their pleadings.

Settlement of the question by this Court is plainly in the public interest, since it is likely to be presented in almost every civil action hereafter commenced, including many hundreds of actions now pending in the Courts of the United States.

The confusion on the question among the lawyers, as well as among some of the Courts, seems to stem from the notion that *form of action* controls the method of trial, rather than *the issues*. This prevailing notion calls for a

classification of the action as either legal or equitable, and then whether, prior to the Federal Rules of Civil Procedure, the action would have been classified as either *historically legal,* or *historically legal and equitable,* or *historically equitable.* It seems to be less confusing where the action can be historically classified as legal, even though equitable counterclaims are presented, or historically classified as exclusively in equity. But, where the action might possibly be classified as *legal and equitable,* it presents the problem of *concurrent jurisdiction,* and joinder of legal and equitable remedies without the loss of the right to trial by jury of the legal issues. That is the situation in the instant case, if there is any substance in Respondent's prayer for an accounting. Otherwise, it is purely a legal action on the contract.

Petitioner believes that the District Court and the Court of Appeals grounded their decisions on form of action rather than on the issues pled and joined, and even then failed to distinguish between actions historically exclusively equitable, and actions historically *legal and equitable* (concurrent jurisdiction,) and thus failed to give effect to the Seventh Amendment to the Constitution of the United States, and the applicable Federal Rules of Civil Procedure concerning jury trials in civil actions.

Although the instant case to our minds is nothing more than an action on a simple contract for money, the District Court and the Court of Appeals seem to hold that since Respondent asked for an accounting ancillary to his legal action on the contract, the entire action is converted to an historically equity action. But at most it amounts only to a matter that formerly law courts and equity courts took turns in exercising jurisdiction, since jurisdiction was concurrent. There are no longer law

actions and bills in equity (Rule 2, Federal Rules of Civil Procedure.) Consequently, the reason for harboring the distinctions between law actions and equity bills has disappeared by reason of the union of law and equity in one civil action.

2) The decision of the Court below in the instant case is directly in conflict with the decision of the Second Circuit Court of Appeals in *Ring v. Spina*, 166 F.2d 546. The action was brought by Ring against Spina and others, for treble damages under the Sherman Anti-Trust Act, and for injunctive and other relief. Thus, legal and equitable claims were joined in a single action that could not have been joined prior to the Federal Rules of Civil Procedure. Prior to the Federal Rules of Civil Procedure, it would have been necessary to maintain two actions in order to obtain complete relief. Motion by defendant to strike the cause from the jury calendar was granted by the District Court, and plaintiff appealed. Defendants moved in the Court of Appeals to dismiss the appeal on the ground that the order striking the cause from the jury calendar was not final, therefore not appealable. However, the Court of Appeals assumed jurisdiction on the ground that the order striking the jury demand was tantamount to an injunction against an action at law.

In the instant case, the District Court struck Petitioner's jury demand and proceeded to trial of the entire case as if it were in equity, and without regard to the pleadings, issues, claims, defenses and remedies, contrary to the Seventh Amendment to the Constitution of the United States, and the applicable Federal Rules of Civil Procedure. The Court below, in affirming the action of the District Court, likewise disregarded the issues made and joined and determined, in holding the action equitable

in character, thereby foreclosing Petitioner's right to jury trial on the issues presented. This holding is directly in conflict with the Seventh Amendment to the Constitution of the United States, and Rule 38(a) of the Federal Rules of Civil Procedure, which implements the constitutional guarantee of right to trial by jury as at common law; and is diametrically opposite to a rational construction of the Seventh Amendment to the Constitution, and the applicable Federal Rules of Civil Procedure, as well as the decision of the Circuit Court in the *Ring-Spina* case.

In the *Ring-Spina* case, the Second Circuit, relying on *Ettelson v. Metropolitan Life Insurance Co.*, 317 U. S. 188, held that since there was no waiver of jury trial on the part of the plaintiff by uniting legal and equitable claims, and since the plaintiff had made proper demand for jury trial, an order striking the case from the jury calendar amounted to an injunction against the execution of plaintiff's law claim, and was therefore appealable.

In the instant case it is obvious, therefore, that the theory of Respondent was that this was an action in equity for an accounting, and it was because of this theory, voluntarily adopted by Respondent himself, that the action was tried in the Court below as a Court action. However, when the pleadings were squared and the case proceeded to trial, the question of an accounting suit did not exist because, 1) the action clearly was one on the contract for a money judgment, and 2) the alleged account was already before the Court, leaving only the legal issues to be determined.

3) The decision of the Court below is believed to be erroneous and conflicts with the decision rendered by it in *Barnett v. New England Mutual Life Insurance Co.* (5th

Cir.) 123 F.2d 712, which latter decision we believe to be correct. Moreover, the decision probably conflicts with the applicable decisions of this Court in *Ettelson v. Metropolitan Life Insurance Co.*, 317 U. S. 188; *Schoenthal v. Irving Trust Co.*, 287 U. S. 92-97; *Enelow v. New York Life Insurance Co.*, 293 U. S. 379 and *Scott v. Neely*, 140 U. S. 348.

a) The *Barnett-New England* case involved an action by insurance company to cancel two life insurance policies issued on the life of David A. Barnett. Mrs. Barnett, the named beneficiary and defendant, filed answer to the cancellation suit and was permitted, after dismissal of her suit on the policies, (which was begun in the State Court and removed to the Federal Court,) to file counterclaims for recovery of the face amounts of the policies, plus double indemnity. The action was then tried to a jury. At the close of the evidence, the District Court dismissed the jury, treated the case as one of equitable cognizance, made findings of fact and conclusions of law upholding the contentions of the insurance company, and decreed cancellation of the policies. Mrs. Barnett appealed, and the cause was reversed and remanded. The Circuit Court said, in part:

> ". . . Under our view of the case it is unnecessary to pass upon the weight or tendencies of the evidence, for we are clear that the trial court erred in withdrawing the case from the jury and treating it as an action of a purely equitable nature. . ."

Thus, the Circuit Court early recognized the distinction between actions purely equitable in nature, and those presenting legal and equitable issues in the same action,

and rightly refused to consider the Findings of Fact by the Trial Court in a jury action.

The Court below, in the instant case, would have ruled correctly had it followed its decision in the *Barnett* case.

b) The *Ettelson-Metropolitan* case involved a suit to recover upon certain policies, and suit was originally brought in a New Jersey State Court and then removed by the defendant to the New Jersey Federal Court on the ground of diversity. Plaintiffs demanded a jury trial. Thereafter, defendant filed an answer alleging that the policies were void because of material false statements made by the insured, and also filed a counterclaim alleging honest misrepresentation, tendering a return of the premiums, and praying that the policies be decreed void and that "plaintiffs be enjoined from further prosecuting the action at law." The District Court denied plaintiffs' motion to dismiss the counterclaim and ordered that it "should be heard and disposed of by the Court sitting in equity prior to trial of the issue made by the complaint and answer in the action at law." On appeal by the plaintiffs to the Circuit Court of Appeals, and on defendant's motion to dismiss the appeal, the Court of Appeals certified the question of appealability, and this Court held that the order was in effect an interlocutory injunction and hence appealable.

The parties to the suit agreed that if the question had arisen prior to the adoption of the Federal Rules of Civil Procedure, this Court's decision in *Enelow v. New York*

would require an affirmative answer to the question.

In disposing of the case, this Court said, in part:

> ". . . As in the Enelow case, so here, the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous it will have to be set aside and the plaintiffs permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. . . "

c) The principal question in the *Schoenthal-Irving* case was whether defendants therein were entitled to have the case tried at law and upon demand to a jury. Suit was brought by Irving Trust Co. in equity to recover from the defendants certain sums of money paid them by the bankrupt. In the complaint it was alleged that the Trust Co. had no adequate remedy at law, that the payments were preferential, that complainant was entitled to an accounting and payment of certain sums of money. Defendants sought by motion to have the case transferred to the law side of the Court. The motion was promptly overruled and trial had as in equity, with judgment going against defendants. The Supreme Court held that complainant did not negative an adequate remedy at law; that the preferences sued for were money payments; that complete relief could have been got at law; and under such circumstances, Section 267 of the Judicial Code prohibits the claim being tried in equity; and that the case should be

transferred to the law side of the Court for trial by jury.

4) The decision of the Court below in the instant case is in conflict with the principles announced by the Second Circuit Court of Appeals in *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, 124 F.2d 563, 565-566, that:

> ". . . The appellee simply relies on the old discarded division when it asserts that a case begun as an 'equity' suit remains as such, so that all rights of jury trial are thereafter waived by all the parties. But there are no longer equity cases and law cases, and it is the issues, not the form of case, which now determine the method of trial. . ."

The Court below no doubt relied on form of action rather than on issues formulated by the pleadings and stipulations of the parties, in foreclosing against Petitioner's right of trial by jury on all issues made and joined in the civil action.

Notwithstanding the issues determine the method of trial, and not the form of action, under the applicable Federal Rules of Civil Procedure, we believe that prior to the adoption of the Rules, Respondent's action would have been an action at law to recover a sum of money under a simple contract, since no fiduciary relationship is created by the terms of the contract, and no money, funds or property were received under the terms thereof, belonging to Respondent or for Respondent's account. The instant action is not for reformation, cancellation or specific performance of the contract; no fraud, accident or mistake is alleged. The contract provides that upon termination of Respondent's employment he will be *paid in cash* any sum of money that is due him. (R. 3.) A debtor and creditor

relationship only is evidenced by the contract. At most, prior to the Federal Rules of Civil Procedure, a Court of Equity may have had concurrent jurisdiction with a Court at Law.

Although the amount due Respondent, if any, must be determined from the books of Petitioner, as in any other ordinary debtor-creditor action, it does not involve an accounting between Respondent and Petitioner. The books of Petitioner may evidence the facts upon which the right depends to recover the sum payable under the contract, but this does not mean that a suit for an accounting will lie. *Scott v. Neely,* 140 U. S. 358; *Broderick v. American General Corp.,* 71 F.2d 864.

5) The decision of the Court below in the instant case is grounded on *McNair v. Burt* (5th Cir.) 68 F.2d 814, 815; *Williams v. Collier,* 48 Am.B.R. (NS) 799, 32 F.S. 321, 324; *Hattiesburg Lumber Company v. Herrick* (5th Cir.) 212 F. 834, 837; and *Kirby v. RR Co.,* 120 U.S. 130, 134. (R. 1019.) Not one of these cases fits the case at bar as to facts or point of time. Each of these cases, excepting however the District Court case of *Williams v. Collier,* was determined prior to the adoption of the Federal Rules of Civil Procedure, and each involved historically equitable remedies other than a mere accounting.

a) For instance, the *McNair-Burt* case illustrates that suit for an accounting is an action over which law and equity have concurrent jurisdiction. This is the type of action which, prior to the Federal Rules of Civil Procedure, gave the plaintiff an option as to which side of the Court he should petition for relief; however, as shown by this case, Respondent could not, by the exercise of this

option, deprive Petitioner of any rights he might otherwise be entitled to had the case been brought on the other side of the Court. By analogy to the Statute of Limitations involved in the *McNair-Burt case,* Respondent in the instant case cannot deprive Petitioner of its right to trial by jury, by attempting to cast the case so as to place it under what was traditionally exclusively equity jurisdiction, since the case at bar is shown to be one sounding at law rather than in equity, or at most, one under which law and equity had concurrent jurisdiction.

b) The case of *Williams v. Collier,* also relied upon by the Court below, is another example. This action was brought by a trustee in bankruptcy seeking to avoid certain transfers, an accounting, judgment for the fair market value of the assets involved, that defendant be declared a trustee ex maleficio and that funds deposited in her name be declared funds belonging to the trustee, and that she be restrained and enjoined from withdrawing them. Such a suit was one traditionally of exclusively equity jurisdiction involving, as it did, both a trustee in bankruptcy and an attempt to impose a trust ex maleficio, and therefore the Trial Court properly refused plaintiffs a jury trial.

c) The *Kirby-RR Co.* case involved an action in equity to set aside sundry settlements of accounts based partly on written agreements and partly on verbal agreements. Fraud was a factor in the settlements sought to be set aside and re-opened. Clearly, this case was of the type at that time for equity cognizance. However, the Court, holding as it did that it was the type action in which equity had concurrent jurisdiction with law, it was bound to give effect to the legal defense of limitations; thus, the reason for affirming the action of the Trial Court in

dismissing the bill because barred by the Statute of Limitations of the State of New York.

Prior to the enactment of the Federal Rules of Civil Procedure, when the jurisdiction of an Equity Court attached, it attached for all purposes and the Court gave complete relief, including that ordinarily obtainable in a Court of Law. At the time this Rule prevailed, the Federal Courts were divided into an equity side and a law side, and plaintiff was necessarily compelled to cast a case upon one side or the other. In some cases, plaintiff had a choice as to whether his suit should be brought in equity or at law; in other cases, he was restricted to the equity side, and in still other cases, to the law side. If plaintiff erred in bringing an exclusively legal action into the equity side of the Court, or vice versa, the action was dismissed or transferred to the proper side of the tribunal.

The Federal Rules of Civil Procedure obviated this cumbersome procedure by abolishing the distinction between law and equity as to procedural matters, thus leaving the only distinction one of remedies. Under the Federal Rules of Civil Procedure, all legal and equitable issues pertaining to a single claim must be presented in one action, and separate legal and equitable claims may be joined in the same action. Because of this possibility, that different types of issues may appear in the same suit, it has been stated that:

> ". . . there are no longer equity cases and law cases, and it is the issues, not the form of case, which now determine the method of trial. . ." *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, and *Ring v. Spina*, supra.

In the words of Mr. Justice Murphy, from *City of Morgantown, W. Va. v. Royal Insurance Co.*, 337 U. S. 254:

> "... Trial by jury is a vital and cherished right, integral in our judicial system ... The Constitution guarantees to litigants in the federal courts the right to have their case tried by a jury, and Rule 38 of the Rules of Civil Procedure explicitly implements that guarantee. Denial of the right in a case where the demanding party is entitled to it is of course error. The rulings of the district courts granting or denying jury trial are subject to the most exacting scrutiny on appeal. . ."

Since the instant case is not one which formerly would have been within the exclusive jurisdiction of equity, and since there were numerous legal issues joined by the pleadings of the parties, the Trial Court should have looked to these issues, rather than at form of action, in determining the method of trial; and, had it done so, it would have determined that the issues were purely legal, and therefore the proper subject matter for submission to a jury.

The applicable Federal Rules of Civil Procedure permit the joinder of legal and equitable remedies without the loss of the right to jury trial.

Therefore, the decision of the Courts below should be reversed, and the action remanded to the Trial Court for trial by jury on all legal issues joined and presented, according to Petitioner's demand under Rule 38 of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF THE UNITED STATES

SEVENTH AMENDMENT

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

FEDERAL RULES OF CIVIL PROCEDURE

RULE 2

"There shall be one form of action to be known as 'civil action'."

RULE 38(a)

"The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

RULE 38(b)

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

RULE 39(a)

"When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties

or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

RULE 42(b)

"The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

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Office - Supreme Court
FILED
JUN 20 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1951

NO. [redacted] 73

H. B. ZACHRY COMPANY, Petitioner

v.

T. N. TERRY, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR RESPONDENT

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9 Cyclopedia of Federal Procedure (3rd Ed.) p. 209, Sec. 31.17 22-23

2 Moore's Federal Practice (2d ed.) p. 421 par. 2.08 21

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IN THE

Supreme Court of the United States

October Term, 1951

NO. 784

H. B. ZACHRY COMPANY, Petitioner

v.

T. N. TERRY, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR RESPONDENT

OPINIONS BELOW

Correctly stated by petitioner.

JURISDICTION

Correctly stated by petitioner.

QUESTION PRESENTED

Petitioner's question is phrased so as to assume there were legal issues in the case, whereas this is

the question in the case, i.e., whether there were any so-called "legal issues" as to which petitioner was entitled to have a trial by jury. The question presented should be phrased as follows:

Whether the Trial Court and Court of Appeals erred in holding that petitioner was not entitled to jury trial based on the finding by both courts that the only remedy sought by respondent was an accounting which, notwithstanding concurrent jurisdiction of law and equity, was an equity action because (1) the contract between petitioner and respondent under which the accounting was sought by respondent created a fiduciary relationship in that by its terms petitioner, as employer, agreed to pay respondent, as employee, 50% of the profits made on crops grown but was to retain most of respondent's share until termination of the contract to offset against respondent's 50% share in possible losses and (2) to unravel the complicated account would be too difficult, if not impossible, for a jury, due to the fact that the accounting involved crops grown during three years, grossing over $480,000 income, and all the records thereon were kept by petitioner, a multi-million dollar construction company, such farming operation having been a mere side line with petitioner.

STATEMENT

The statement made by petitioner contains none of the facts which convinced the Trial Court and

Court of Appeals that the respondent's only claim was for an accounting which was, to use old labels, an action in equity and not at law. For this reason, respondent here makes a summary statement of such facts so this court will have the proper background facts in considering the petition. Furthermore, petitioner's statement of the issues involved is not correct, and respondent consequently summarizes such issues in Appendix A attached hereto, which summary clearly shows the complicated nature of the accounting involved even after the long drawn out pre-trial proceedings prior to the trial.

Since the Trial Court, commencing R. 978 through R. 983, made findings as to most of the facts which form the proper background for determining that this case is an equity action, respondent uses his language where possible and identifies same with quotation marks; but adding thereto the references to the record upon which the Trial Court based such findings. (Emphasis supplied by respondent.)

"Action was by plaintiff, a citizen of Texas, against defendant, a Delaware corporation, for an accounting upon a letter contract of employment for the management of certain crops grown upon farm lands near Laredo, Texas* * *.

"Defendant's *principal business is general contracting*, especially the building and maintenance of highways (R. 722-723). It had, however, purchased a farm and ranch in Webb County known as the 'Rancho Blanco' of which the 'Buena Vista Farms' was a part (R. 583-4; 170).* * *

"Plaintiff first went to work for defendant as a farm manager in the year 1943 under an oral contract whereby he was to receive $75.00 per week, with an understanding that all employees of defendant, performing satisfactory services, generally participated in bonuses. (R. 612). Plaintiff did receive small bonuses from time to time under his first employment (R. 391).

"The ranch and farm *lies* in a dry farming area, but the portion involved in this contract is subject to irrigation for the growing of vegetable crops. The 'crop year' begins June 1st of each year (R. 462) and it is possible to grow two vegetable crops during each crop year. Shortly before June 10, 1946 defendant recognized that plaintiff was entitled to a 10% bonus or share in the profits for the preceding (1945-46) crop year. (R. 169). At that time, the parties entered into a written contract in the form of a letter, reading as follows (R. 2):

"H. B. ZACHRY CO.
General Contracts
Laredo-San Antonio
Texas

10 June 1946

"Mr. Tom Terry
Box 850
Laredo, Texas

"Dear Tommy:

"The following, I believe, covers our under-

standing of the deal which will apply to your employment beginning June 1, 1946:

"You are to be employed by us to manage certain specific crops which we expect to grow at Rancho Blanco. The type of crops, location and acreage will be mutually agreed to prior land preparation time. Your compensation will be $150.00 per month. To encourage efficiency, you will share in the net profit on your crops after harvest and sale. Your share of net profit is not to be paid in cash but will be allowed in the form of a credit to your account and will amount to 50% of such profit figure cumulatively on all your crops after June 1, 1946. Likewise, 50% of any net loss on such crops will be charged to your account. You will be allowed to draw not to exceed $1,000.00 in any three month period, chargeable to your account, so long as you have a credit balance with the Company. Any such credit you may have at termination of employment will be paid in cash, only after all crops planted under this deal are harvested and sold. In other words, if you should resign or be terminated while crops were in process, final settlement would have to await completion of these crops in order that their final results may be included.

"On June 15, 1946, you will be given a credit on our books of $_____ (10% of net profit to be adjusted) as your bonus for the 1945-46 onion crop. Your credit will be adjusted upon the completion of each succeeding crop.

"The total cost of these crops will include all the applicable direct costs, including your monthly salary, plus $50.00 per acre for onions or $20.00 per acre for other crops, to cover ren-

tals on land and on equipment now owned by the Company and assigned to your use. Any rental of equipment from outsiders, purchase of additional equipment or cost of replacement of existing equipment for your use is to be added to your crop costs.

"Under the arrangement outlined above, your status will be that of an employee of the H. B. Zachry Company and not as a sharecropper. The profit sharing feature of this deal is intended as a reward for over-all efficiency of management and not as wages. All transactions will be in the name of the Company and subject to the approval and instructions of the undersigned. You are to have no legal interest nor equity in any growing crop except such as the undersigned chooses to recognize.

"You will be held responsible to the undersigned for the crops assigned to you along with the necessary land, irrigation system, force and equipment therefor. For the ensuing twelve months you are assigned approximately 100 acres of carrots to be planted on any or all of that part of the farm West of the outlet ditch from No. 1 reservoir. Also, approximately 125 acres of onions to be planted upon what is known as the Buena Vista Field, East of the Lake. For these crops you are assigned the pumping plant at the No. 1 reservoir, the pumping plant on the East side of the Lake and the exclusive use of one Model B John Deere Tractor and all of the vegetable crop attachments therefor; the rain-machine system and the pump therefor; one pick-up truck and the cab-over-engine 1½ ton truck. In addition, you will be charged with the responsibility of the operation, care and maintenance of the RD-4

Caterpillar Tractor, the Model H John Deere Tractor, the Terracer, Bulldozer and Land Leveler, on the use of which pieces of equipment you will have the priority, but will make them available for other operations of the farm and ranch. Cross charges between you and the foremen of other operations on the farm for labor, etc., will not be permitted except as approved by both parties.

"Aside from the specific responsibilities delegated here in, your active constructive cooperation and interest in other farm and ranch operations will be expected.

"If all the foregoing is in accordance with your understanding, please initial this letter and return. You may keep the copy for your files.

Yours very truly,
H. B. ZACHRY COMPANY
By /s/ Wayne D. Tiner
WAYNE D. TINER
President

WDT:j
/s/ Tom N. Terry"

The blank space in the above contract was afterwards determined by defendant to be $3824.08 (R. 269, 466).

"The parties operated amicably under the contract for nearly three years. Plaintiff applied himself not only to the farming operations for vegetable crops, but co-operated in other farm and ranch operations as required by the seventh paragraph of the letter contract (R. 338, 345). He displayed

overall efficiency and *defendant was well pleased* with his services and the results obtained (R. 679; 589-592).* * *

"Nearly *half a million dollars gross income* was derived by defendant from sale of farm products and produce on crops grown under plaintiff's management during the three crop years ending May 31st 1949 when the contract was terminated (R. 95). During the first two years of the contract, and the greater portion of the third year of the contract, plaintiff's credits were such that he was not limited to the withdrawal of his salary and the $1000.00 drawing account for each quarter as provided in the contract (R. 607-608).* * *

"About January 1st 1949 plaintiff sought additional advances of his proportion of the profits in order to pay income tax on such profits (R. 564-565 and R. 238-242). *At that time he had been given credit for over* $50,000.00 *on defendant's books* notwithstanding withdrawals in excess of the $1000.00 per quarter (R. 240; 506; 829), (and it might be added that respondent was then told he had such credit, R. 240).* * * When defendant refused to permit plaintiff to withdraw sufficient moneys to pay the income tax as plaintiff contended for, plaintiff notified defendant that he intended to terminate the contract at the conclusion of the onion crop then growing (R. 242). Defendant was *disappointed*, to say the least, and its said chairman of the Board, when he prepared a statement of plaintiff's account which was submitted to plaintiff

on June 28, 1949 therein *sought to charge* the farming account with various items, such as taxes, insurances, depreciation on equipment, on a reservoir, on a water tower, etc., *none of which charges had been made to the account during the first two years of the contract* (R. 309-314-315)." *According to such account* (R. 253, 250) petitioner *only owed* respondent $16,536.01, *notwithstanding* the aforesaid credit of over $50,000.00 and further the fact that the onion crop just harvested *had been profitable.* (R. 506-7).

Departing now from the language of the findings of the trial court in order to continue in a chronological order, the facts are that on September 1st, 1949, approximately two months after petitioner had submitted aforesaid grossly incorrect statement of account to the respondent, respondent filed his original complaint (commencing R. 2 through R. 13), in which he alleged and set out the above quoted contract, alleged that he had performed the services called for therein and that in his be lief net profits aggregating approximately $180,000.00 had been made under such contract "*but the exact amount of which can only be ascertained from defendant's (Petitioner's) books and records*"; that such contract continued in force until June 28, 1949 on which date it was terminated and on which date petitioner furnished to respondent the said statement believed by respondent (and later found by both courts below to be) *outrageously erroneous.* The complaint then alleged in detail the errors apparent from such statement though it is plain therefrom that the re-

spondent could not be positive about certain of the alleged errors because of his not having any books and records thereon. Such complaint then reads as follows, (R. 12 to R. 13):

"7. That plaintiff has no plain, adequate or complete remedy at law in that:

"a. The operations under said contract required the expenditure of, and during that time there were received, large sums of money thereby requiring a detailed system of records and bookkeeping which is so voluminous and complicated that it would be impossible for a jury to understand, analyze or properly interpret same.

"b. Defendant, who is holding in trust for plaintiff the money due plaintiff under said contract, occupies such a fiduciary relationship towards a plaintiff that this Court, as a court of equity, should require of defendant an accounting.

"c. While defendant has full knowledge and information as to the amount due plaintiff, plaintiff has insufficient information to assert his rights in an action at law and must have the assistance of this honorable court under its broad equitable powers in discovering and obtaining such information. In this connection plaintiff alleges that defendant's books, records, cancelled checks, accounts of sales and supporting invoices, statements and other documents pertaining to such farming operations, should (and will if same have been properly kept) reflect all the information needed to ascertain, plead and prove the exact amount due plaintiff

by defendant, and plaintiff has no other place or means from which such information can be obtained.

"WHEREFORE, plaintiff demands judgment:

"1. That defendant be required to account to plaintiff for the net profits earned by it from said farming operations, and for plaintiff's share thereof.

"2. That defendant be ordered and required to produce its books of account, records, cancelled checks, accounts of sales and supporting invoices, statements and other documents pertaining to such farming operations, upon the trial of this action, and prior thereto, for inspection by plaintiff, his counsel and auditor.

"3. That plaintiff have and recover judgment against defendant for such amount as may be found to be due plaintiff from defendant on such accounting together with interest as allowed by law.

"4. That plaintiff have and recover his costs and disbursements in this action.

"5. For such other and further relief, at law or in equity, as to the court may seem just and equitable in the premises."

While such complaint was amended on September 11, 1950 (R. 53) to include a claim for attorneys fees under Texas Statute Art. 2226, the nature of the complaint was not changed and the trial court in a memorandum decision (R. 76, 91-93), prior to trial of the case, held that respondent was not entitled to recover attorneys fees so this was not in

the case at the time it went to trial, nor on the appeal. Respondent also, on January 20, 1951 and on January 29th 1951, filed amendments to such complaint (R. 102-107) alleging subsequent oral agreements and that the phrase in the contract "applicable direct costs" was ambiguous, in order that same would be considered in connection with determining what the account from petitioner to respondent should be.

Petitioner filed three answers (R. 27, 30, and 68), an original and two amended answers, and also a supplemental answer (R. 117) and by such answers raised certain affirmative defenses, joined issue with the respondent concerning his right to an accounting and, if respondent proved he was entitled to an accounting, raised issues as to what such account should be. Petitioner *never admitted*, but steadfastly denied, that *respondent was entitled to an accounting*, as is apparent from such pleadings. Even in the stipulation filed a year and some four months after the suit was commenced, (and after respondent had *partially* audited petitioner's books under court order), wherein petitioner finally submitted an account, petitioner expressly conditioned same by stating that it was "subject to plaintiff (respondent) showing at law or in equity that he is entitled to an account from defendant (petitioner) . . ." (R. 94).

Respondent kept no record of the farming operations but all of such records were kept by the petitioner (R. 434). An idea of the complexity of the

farm account alone is apparent from the fact that the report of the audit of same, made by Ernst & Ernst, an accounting firm, and introduced in evidence by petitioner, occupies some 27 pages of the record (R. 776 through 802).

The complexity in this case, however, is not only that which naturally exists in any situation involving the examination of intricate books and records in order to obtain an account, but in addition, this case has the further real and bewildering complexity that the farm account was intermingled by petitioner with its extremely voluminous other books and records pertaining to its tremendous and far reaching construction business (see Mogas' testimony R. 460) which construction business alone spent in excess of ten million dollars during the three years under the contract. See R. 740-742 and Ernst & Ernst statement of "General Administrative Expense", in defendant's Exhibit 7, R. 797. Thus, to arrive at a proper account from the books and records kept by petitioner, it was necessary to audit not only the books and records pertaining to the farming operation, btu also the books and records pertaining to the petitioner's said principal business.

SUMMARY OF ARGUMENT

Pursuant to the recommendation contained in Court Rule 27, respondent makes the following summary of the reply argument which conclusively establishes that this petition should be denied:

1. Both the Trial Court and Court of Appeals correctly held that the only remedy sought by respondent was an accounting and that prior to the Federal Rules of Civil Procedure the issues involved in granting such remedy would have been tried by the court, as a court of equity, because, notwithstanding concurrent jurisdiction with law, such action was a case for equity jurisdiction by reason of (a) the fiduciary relation existing between the parties and (b) the fact that the accounts involved were so complicated that a jury could not satisfactorily unravel same, both of which factors rendered the remedy at law inadequate. Petitioner does not assail this fundamental holding by the Trial Court and Court of Appeals (p. 18 its brief) but contends that nevertheless it was entitled to a jury trial.

2. Both the trial court and Court of Appeals, after reaching the conclusion stated in preceding paragraph 1, correctly held that nothing in the Federal Rules of Civil Procedure gave petitioner the right to a jury but that, as prior to such Rules, petitioner's right was governed by the Seventh Amendment to the Constitution, which did not authorize a jury trial of equity actions, and therefore petitioner was not entitled to a jury in this case. Petitioner claims, and the petition is based on said claim, (pages 18-19) that the Federal Rules of Civil Procedure have changed this law and now, notwithstanding the fact that formerly all the issues of this case would have been tried by the court as a court of equity, all the issues in this case should have been tried by a jury. In other words

petitioner is taking the manifestly absurd position that the Federal Rules enlarged the petitioner's right to a jury trial over such right as it existed under the Seventh Amendment.

3. Petitioner's brief simply states, *without any authority whatsoever*, that the issues it enumerates (which respondent denies to be correctly stated and refers the court to Appendix A) are legal issues. Petitioner does not bother to explain just how the issues in an equity action suddenly become legal issues to be tried by a jury. The authorities relied upon by petitioner are not in point on this question because they are cases in which there were both legal and equitable remedies involved in the same case (the majority of them involving counterclaims of a different nature from the plaintiff's claim) or else are cases wherein it was held that the complaint did not allege an equitable claim (none of such cases, however, are accounting cases) but a legal claim.

ARGUMENT

I

Respondent's Only Claim For Relief Was An Accounting, Which, To Use Old Labels, Was An Action in Equity and Not At Law

On September 1, 1949 when respondent filed his

complaint he made only one claim for relief:[1] that petitioner be made to truly account to him for his share in the profits made under the contract quoted in foregoing Statement, and by the terms of such contract held in reserve by petitioner for respondent until the contract should be terminated. The remedy of an accounting was the only remedy through which respondent could get relief. Six months before the contract was terminated, respondent had been told by an officer of petitioner that such share in profits held in reserve then amounted to over $50,000.00 and in fact petitioner, on its books, then had a credit to respondent's account in such amount. But on June 28, 1949, only six months later, and after the subsequent harvest of a profitable onion crop, petitioner submitted the statement appearing R. 253 (offered R. 250) under which *respondent would have been entitled to only* $16,536.01. From over $50,000.00 plus respondent's part of the profits of such onion crop to $16,500.00 in one fell swoop. What could respondent do about it? Petitioner kept all the records and accounts of such farming operation. Respondent disagreed with virtually every item of the June 28th statement furnished him but had no records with which to prove the falsity of those portions thereof which were not obviously duplications, and thereby determine how petitioner

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[1]Respondent subsequently amended to also claim attorney's fees under a Texas Statute but prior to trial the Trial Court held that he was not entitled to recover same, as a matter of law, and hence there were no issues in this connection, and it can have no effect on petitioner's right to a jury.

had contrived to offer to pay him only $16,536.01 instead of the $50,000.00 plus his share in the profits made on the onion crop harvested in the meantime. Had respondent kept the records and known the amount due him he might have sought the legal remedies of account-render, or account stater, or damages for breach of contract, but respondent did not, and apart from an audit of petitioner's voluminous records could not, know what was actually due him. Respondent, because of his lack of information and the extremely complicated nature of the many accounts from which the facts of the account could be obtained, could only demand on accounting under the protective wing of a court of equity. Furthermore, respondent, by entering into the contract, had put the petitioner in a position of trust and confidence which the courts would not permit petitioner to violate, as it attempted to do in submitting such statement on June 28th. Hence respondent sought the equitable remedy of an accounting, through which alone respondent could secure the relief to which he was entitled; no legal remedy being adequate, as alleged. There can be no question but the Trial Court and Court of Appeals correctly held that notwithstanding the concurrent jurisdiction of law and equity over suits for an accounting that this was a case for equity jurisdiction, the law remedy being inadequate, due to (1) the fiduciary relationship created by above quoted contract between the parties and (2) the fact that the accounts involved were too complicated for a jury to unravel. In so holding, the Trial Court and Court of Appeals are supported by a multitude of authorities which

cannot be questioned. Both courts relied upon the decision by this Court in *Kirby* v. *Lake Shore R.R.*, 120 US 130, 4, 30 L. Ed. 569, 571, the pertinent portion of which opinion is, for the convenience of the Court, quoted in Appendix B. Likewise quoted in such Appendix B, in the order in which named, are the pertinent portions of the following authorities which support this proposition: 4 Pomeroy's Equity Jurisprudence (5th Ed.) 1076, 1077, Sections 1420 and 1421; *Kilbourn* v. *Sunderland*, 130 U.S. 505, 514, 32 L. Ed. 1005, 1009; *Goffe & Clarkener, Inc.*, vv. *Lyons Milling Co.*, 26 F. 2d 801, 804, *Zickel* v. *Knell* (Mo.), 210 SW 2d 59, 61, 62, 63, and *Elliott* v. *Murphy Timber Co.*, 117 Ore. 387, 244 Pac. 91, 48 ALR 1043, 1046. Such last two state decisions are cited because of their close parallel to the faces in this case and since such state courts applied the same principles of law as are followed in the Federal Courts. In addition to the authorities cited above this Court is respectfully referred to the authorities relied upon by the Trial Court in his memorandum decision, R. 79 to R. 84, and those relied upon by the Court of Appeals, R. 1023-1024, which authorities, notwithstanding petitioner's assertions to the contrary, are directly in point on this proposition, i.e., that respondent's action is one in equity. Furthermore, this case is no different from several other District Court cases involving suits for an accounting from which there was no appeal, such as *Taylor* v. *McKeever*, 1 F.R.D. 565, 6, *Irving Trust Co.* v. *McKeever*, 44 F. Supp. 842, 5; *Bercovici* v. *Chaplin*, 3 F.R.D. 409, 10 (Syl. 5-7) and *Edward B. Marks*

Music Corp. v. *Wonnell*, 4 F.R.D. 146. For opinions, persuasive because of their careful analysis of the law concerning jury demands in actions which formerly would have been in equity, see *Fitzpatrick* v. *Sun Life Assur. Co. of Canada*, 1 F.R.D. 713 and *Bellavance* v. *Plastic-Craft Novelty Co.*, 30 F. Supp. 37, the principles in which are controlling here. Also see 5 Moore's Federal Practice, (2d ed.) par. 38.25 and cases cited.

II

Under The Seventh Amendment To The Constitution Petitioner Was Not Entitled To A Trial By Jury

Since respondent's only claim for relief was, prior to the Federal Rules of Civil Procedure, an action in equity (and as pointed out petitioner does not attack this unquestionably correct conclusion by the Trial Court and Court of Appeals) under the Seventh Amendment to the Constitution petitioner was not entitled to a jury trial unless the Rules operate to enlarge petitioner's right to a jury. The very ridiculousness of the idea that the Rules could enlarge upon the Seventh Amendment should be sufficient proof that the Rules had no such effect, and this Court has, since promulgating such Rules, manifested no uncertainty or confusion on the point.

In *U. S.* v. *Louisiana*, 339 U.S. 699, 706, 94 L. ed. 1216, 1220, this Court held:

"Louisiana's motion for a jury trial is denied. *We need not examine it beyond noting that this is an equity action for an injunction and accounting.* The Seventh Amendment and the statute (28 USCA Sec. 1872, FCA title 28, Sec. 1872), assuming they extend to cases under our original jurisdiction, are applicable only to actions at law.* * *"

To have held otherwise, would have required overruling such former decisions as in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 US 1, 48, 57 S.Ct. 615, 81 L. Ed. 893, 918, in which it was held:

"The Seventh Amendment provides that ' In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted.* * *Thus it has *no application* to cases where recovery of money damages *is an incident to equitable relief* even though damages might have been recovered in an action at law. * * *It does not apply where the proceeding is not in the nature of a suit at common law.* * *"

The above quoted holdings of this Court follow an unbroken line of decisions since *Shields* v. *Thomas*, 18 How. 253, 262, 15 L. Ed. 368, 372, (which is cited in each of the above decisions) wherein it was held:

"This provision (referring to the Seventh Amendment) correctly interpreted, cannot be made to embrace the established, exclusive

> jurisdiction of courts of quity, *nor that which they have exercised as concurrent with courts of law;* but should be understood as limited to rights and remedies peculiarly legal in their nature; and such as it was proper to assert in courts of law, and by the appropriate modes and preceedings of courts of law."

Professor Moore, in 5 Moore's Federal Practice (2d ed.) 40 par. 38.07 (1), unequivocally states what should be obvious: "In brief, the Rules contain no affirmative grant; they neither *enlarge* nor restrict the right to jury trial." Following this statement he quotes extensively from many decisions, since the Rules, so holding. Petitioner also quotes from *City of Morgantown, W. Va.* v. *Royal Insurance Co.*, 337 US 254, 93 L. Ed. 1347 to the effect that Rule 38 implements the guarantee of the right to a jury provided for in the Seventh Amendment, but the corollary of this proposition is also true. Moore, in 2 Moore's Federal Practice (2d ed.) 421 par. 2.08, states this corollary as follows:

> "Thus the Supreme Court has jealously guarded the right to jury trial *in proper cases. Just as carefully* it has *refused* to extend that right into fields properly triable by the Court without a jury, namely, 'equitable' cases."

Petitioner claims that the Bench and Bar are confused on the question presented in this brief. There is no confusion. However, there would be confusion if in every case the Rules required the Courts to ignore the nature of the remedy sought and created the situation of there being both so-called "legal"

and "equitable issues" in every case as petitioner here contends. The rules do not create any such confusion, otherwise it would be necessary that they attempt to define what are "legal issues" and what are "equitable issues". While petitioner claims the Rules have such effect, it does not proffer any definition of "legal" and "equitable" issues but, simply ignoring the remedy sought by respondent, dogmatically says that the issues it states were "legal issues."

As Barron & Holtzoff, in Volume 2 of their new work, Federal Practice & Procedure, p. 572, Sec. 871 state:

> "The problem (when a party is entitled to a jury trial) should give difficulty in relatively few cases. Any confusion arising in these is due to a failure to make full and intelligent use of the rules, not to any fault of the rules themselves."

It is by attempting to assert that the Rules enlarged its right to a jury trial and ignoring the remedy sought by respondent that petitioner has become confused. No confusion results if the remedy sought is not ignored as petitioner endeavors to do. In 9 Cyc. of Fed. Proc. (3rd ed.) 209 Sec. 31.17 what respondent submits is the obvious answer to this case, is neatly stated as follows:

> "The distinction between law and equity, abolished by the Rules of Civil Procedure, is a distinction in procedure *and not a distinction*

between remedies; and the distinction between suits at law and suits in equity *still remains* for the purpose of determining whether a party is entitled to a trial by jury under the Seventh Amendment to the constitution."

III

Petitioner's Cases Show No Confusion But Are Simply Not In Point

As has been conclusively shown, petitioner was not entitled to a jury because the only remedy which respondent sought, an accounting, was equitable in nature. Petitioner's writ is based on authorities which do not hold to the contrary on this proposition and are therefore not in point. Such authorities would be in point had respondent sought other relief, other remedies, in addition to an accounting, which other relief was legal in nature, or had petitioner filed a legal counterclaim against respondent. To sustain this assertion, respondent points out that the cases cited by petitioner come within one of the following categories (and hence do not apply to this case) namely, (1) cases in which plaintiff tried to maintain an action in equity but the court held that such action was at law, not in equity, *but none* of such cses involve an action for an accounting, (2) cases where plaintiff joined in his complaint two claims for relief, one of which was equitable in nature, the other legal, or (3) cases where plaintiff brought an action in equity and defendant filed a counterclaim at law, or vice versa. Professor Moore,

in 5 Moore's Federal Practice (2d ed.) 39 par. 38.07 (1) recognizes these categories as follows:

> "The design of Rules 38 and 39 is to provide, without the impairment of any substantive rights, an expeditious procedure whereby the mode of trial, jury or court, may be determined shortly after the issues are formulated and thus prior to trial; that the right of jury trial as declared by the Seventh Amendment or given by a federal statute may be had on timely demand, otherwise it is waived; and that actions triable to a jury are 'jury actions', all other actions are 'court actions'. Both equitable and legal issues may appear in an action, as where *equitable and legal claims are joined*, or a *legal counterclaim is interposed in an equitable action*, or an *equitable defense or counterclaim is interposed in a legal action*, without the impairment of the method of trial: equitable issues are properly for the court; legal issues for the jury, provided (1) a right to jury trial is declared by the Seventh Amendment or as been given by a federal statute and (2) the right is properly demanded, otherwise the legal issues are for the court."

Now to place petitioner's cases within their respective categories:

FIRST CATEGORY: (a) Petitioner claims (brief p. 8) that "the case most nearly in point, since promulgation of the Federal Rules of Civil Procedure, came out of the Fifth Circuit in 1942, being *Barnett* v. *New England Mutual ife Insurance Co.*, 123 F. 2d 712." In such case plaintiff insurance

company brought an equitable action for cancellation of two insurance policies against the beneficiary and such beneficiary filed a legal counterclaim against plaintiff to recover the face amount of such policies. The court held that plaintiff was not entitled to equitable relief but that the matters it raised should be asserted as defenses to defendant's legal counterclaim for the amount of the policies and hence, on such legal counterclaim defendant was entitled to a jury trial. In the instant case respondent's claim for relief remained the same and no legal counterclaim was involved.

(b) The case of *Schoenthal* v. *Irving Trust Co.*, 287 US 92, 97, 77 L. Ed. 185 (cited p. 12 of petitioner's brief) likewise comes within such category. The plaintiff, a trustee in bankruptcy, filed a suit in equity to recover two preferential payments. The Court held plaintiff was not entitled to sue in equity but its cause of action was at law and hence defendants were entitled to a jury trial. The Court's holding (287 US at page 95) is as follows: The facts here alleged give no support to plaintiff's assertion that it has no adequate remedy at law. The preference sued for were money payments of ascertained and definite amounts. *The bill discloses no facts that call for an accounting* or other equitable relief.* * *"

(c) The case of *Scott* v. *Neely*, 140 US 106, 35 L. Ed. 358, (cited page 12 of petitioner's brief) comes within this category. In the Scott case the plaintiff sought relief under a Mississippi statute and claim-

ed that such statute made the action one in equity. This is an important decision because this court held that such state statute could not change the Federal law as to defendant's right to a jury trial under the Seventh Amendment, i.e. if, but for such Mississippi statute plaintiff's action would be one at law in Federal Courts, such state law could not make it an action in equity. The holding of the Court (140 US at p. 110) is as follows:

> "In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action, only, in which the defendants were entitled to a jury trial in the federal courts. Uniting with a demand for its payments, under the Statute of Mississippi, a proceeding to set aside alleged fraudulent conveyances of the defendants, did not take that right from them, or in any respect impair it."

(d) Finally, the case of *Broderick* v. *American General Corporation* (CCA 4), 71 F. 2d 864 comes within this category. The Fourth Circuit in the Broderick case affirmed the decision of the trial court dismissing plaintiff's bill filed in equity but reversed and remanded the cause because the trial court should have ordered the case transferred to th law docket. In determining that plaintiff alleged no cause of action in equity the court discusses the situation where an accounting suit is not maintainable in equity which discussion does not in anyway conflict with the contrary holding in the case at bar. Furthermore, such discussion is mere dictum since

in the next paragraph (Syl 7, p. 868) the Court holds: "But this case does not involve an accounting which is a matter of settling accounts between the parties."

SECOND CATEGORY: (a) The case of *Ring* v. *Spina* (CCA 2), 166 F. 2d 546 cited by petitioner comes within this second category, that is, where the plaintiff joined in his complaint a claim for equitable relief and also for legal relief. The principal relief sought by plaintiff was legal, i.e., treble damages under the Sherman Anti-Trust Act but he also sought incidental equitable relief in the nature of injunctions. Professor Moore in 5 Moore's Federal Practice (2d ed.) 144 par. 38.13 so classified such case. His statement is as follows:

> "In *Ring* v. *Spina* plaintiff sued for damages under the Sherman Anti-Trust Act, and *also sought injunctive relief*. Prior to the Federal Rules the plaintiff would have had to bring two actions: one on the law side of the court; the other on the equity side. Under the Federal Rules the plaintiff may (indeed, should) present both the legal and equitable grounds in support of what should but one claim or cause of action under the united procedure."

Professor Moore goes on to elaborate on the principle that where legal and equitable claims are joined such as in *Ring* v. *Spina*, no right to a jury is waived as to the legal claim. As is pointed out in such Ring case, the court can impanel the jury to decide the issues as to damages and should there be any issues

as to whether plaintiff is also entitled to injunctive relief, then the Court can simply decide these as a court of equity. What was the legal claim in the case now before this court? It could not be the fact that respondent, after the settling of the account by the Court, was awarded a judgment for $52,864.49 because this is the ordinary incident to an accounting action. Even if considered as damages, it could only be considered as incidental to the equitable relief of adjusting and settling the complicated account, and, as held in foregoing case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 US 1, 48, 57 S.Ct. 615, 81 L. Ed. 893, 918: "Thus it (referring to Seventh Amendment) has no application to cases where recovery of money damages is an incident to equitable relief *even though damages might have been recovered in an action at law.*" In the case at bar the respondent did not include two claims for relief in his complaint but had only the one claim, that is for an accounting.

b. The case of *Beaunit Mills, Inc.* v. *Eday Fabric Sales Cortoration* (CCA 2) 124 F. 2d 563 might be considered to come within this second category because the Second Circuit left open the question as to whether plaintiff's petition for declaratory relief, in addition to its claim for the equitable relief of an injunction and account, might, after determination by the Court of the issues in connection with the equitable claims for relief, present "legal issues." Since the nature of a declaratory judgment relief is neither legal nor equitable, but sui generis, it presents a problem concerning the right to a jury

trial not in this case and it was this problem that the Second Circuit was concerned with when it made the statement quoted by petitioner on pages 15 and 18 of its brief. The *Beaunit* case is more easily explained in connection with cases discussed in the third category hereof and this court is referred to such discussion which follows, for an elaboration on the obvious distinction here pointed out.

THIRD CATEGORY: The cases relief upon by petitioner, coming within this category, i.e., where the plaintiff asserts a legal claim and the defendants assert an equitable counterclaim, or vice versa, are *Enelow* v. *New York Life Insurance Co.*, 293 US 379, 79 L. Ed. 440, *Ettelson* v. *Metropolitan Life Insurance Company*, 317 US 188, 87 L. Ed. 176 and *City of Morgantown, W. Va.* v. *Royal Insurance Co.*, 337 US 254, 259, 93 L. Ed. 1347, 1351. As noted above, respondent also discusses the case of *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corporation* (CCA 2) 124 Fed. 2d 563, 565-566.

Justice Frankfurter, in his concurring opinion in *City of Morgantown* case describes the situation involved in the above *Enelow* and *Ettleson* cases and the difference between such two cases and the *Morgantown* case, in such a clear fashion, that the distinction between all three of such cases and the case at bar becomes readily apparent, consequently respondent quotes such opinion as follows, (omitting from such quotation, however, for the sake of brevity, the ground of decision in the *Enelow* case as quoted by Justic Frankfurter):

"In the two earlier cases (the Ettleson and Enelow ases) an action at law was brought on an insurance policy. Of course this entitled the plaintiff to a trial by jury. The defendant asked for a cancellation of the policy because of fraud. The district court entered an order suspending the action at law, to be tried by a jury, until the later-begun equitable proceeding—trial without a jury—was concluded. This Court was caled upon to construe Sec. 129 of the Judicial Code allowing appeals in limited categories of interlocutory deisions. 28 USC Sec. 227, now Sec. 1292. With due regard to the actualities of the situation, the Court held that the staying of an action at law by the chancellor is an interlocutory injunction and as such appealable, even though the chancellor who granted such an interlocutory order be the same judge before whom the earlier ation at law was pending. The ground of the decision in the Enelow Case leaves no doubt as to its scope.* * *

"In this case the plaintiff instituted a suit in equity for the reformation of an instrument. The insured, by way of counterclaim, contested that suit and, in addition, sought recovery on the policy. The latter was a conventional action at law which, under the Constitution, entitled the defendant to a jury trial. The judge continued this action at law until the prior equitable proceeding could be concluded. The facts, therefore, are precisely the opposite of those in the Enelow Case. Here there was no intervention by a court of equity in proceedings at law, but 'a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so

> as to maintain the orderly processes of justice.' 293 US at 381, 382. Since an interlocutory proceeding in an action at law cannot possibly be brought within the limited class of appealable interlocutory decisions under the old Sec. 129 of the Judicial Code (now 28 USC Sec. 1292), there is an end to the matter."

From the foregoing, it should be clear that such three cases fall into this category and do not have any application to this case which involves only an equity action by respondent and no legal counterclaim.

The case of *Beaunit Bills, Inc.* v. *Eday Fabric Sales Corp.*, (CCA 2) 124 F. 2d 563, relied upon strongly by petitioner presents the same situation as was involved in the *City of Morgantown* case, exept that in the *Beaunit Mills* Case plaintiff sought a delaratory judgment along with the equitable relief of an injunction and an accounting in connection with some patents. The Second Circuit simply held that the refusal by the trial court to impanel a jury until the issues in connection witha the plaintiff's claims for equitable relief were settled by the Court was not an appealable order just as this Court held in the *City of Morgantown* case. By way of dictum the Second Circuit, in decrying piecemeal appeals, made the statement quoted by petitioner on pages 15 and 18 of its brief, to the effect that the issues determine the mode of trial and after the disposition of equitable issues, legal issues might be presented which would require the impanelling of a jury. Petitioner did not quote the statement of the Court

immediately preceding the statement relied upon the petitioner, which makes this clear, that is (at page 565):

> "Here. . .considering the complaint alone, it is framed along equitable lines looking to injunctive relief, both prohibitory and mandatory in character, as well as an accounting, together with declaratory relief substantially as incident thereto. This appears to stamp it as presenting equitable issues only, *Bellavance* v. *Plastic-Craft Novelty Co., D. C. Mass.*, 30 F. Supp. 37, 39; and hence when the district judge acted, he was correct in denying jury trial. * * * (here follows part quoted by petitioner)."

The Second Circuit, since it was dealing with a declaratory judgment case, naturally and correctly went on to add the part quoted by petitioner to the effect that possible "legal issues" might occur after disposition of the equitable claims for relief, or perhaps in connection with defendant's counterclaim. The *Beaunit* case is therefore not a bit inconsistent with this case but to be applicable respondent, in the case at bar, would have had to have sought legal relief in addition to an accounting, or else petitioner would have had to have made a legal counterclaim, which was not disposed of by respondent's clim for equitable relief.

CONCLUSION

It is apparent from the foregoing that the petition is without merit and should be denied.

Respectfully submitted,

Mann

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OF COUNSEL:

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Laredo, Texas

Attorney for Respondent

I, G. C. Mann, do hereby certify that Messrs. Chester H. Johnson, whose address is Transit Tower, San Antonio, Texas, Maury Maverick, whose address is Transit Tower, San Antonio, Texas, and Gordon Gibson, Laredo, Texas, petitioner's attorneys of record, have each, this the 18th day of June, 1952, been mailed a copy of this brief.

Mann

G. C. Mann

APPENDIX A

After ordering petitioner to permit respondent to audit the petitioner's books and records (the motions for which and orders covering same were omitted from the record for the sake of brevity) and after requiring petitioner to furnish respondent with a copy of its audit prepared by the accounting firm of Ernst & Ernst (the motion for which and order requiring same were likewise omitted from the record for the sake of brevity) which audit appears in the record commencing page 775, and after the court had filed an extensive memorandum opinion, R. 76, petitioner and respondent entered into the stipulation appearing R. 94. Thus by the usual machinery of equity the issues finally narrowed down to:

1. Whether respondent was entitled to an account. The petitioner contended he was not unless he had displayed overall efficiency. While the respondent took the position that this was no defense, the question became moot because respondent overwhelmingly proved overall efficiency and the President of petitioner admitted respondent had displayed overall efficiency (R. 679).

2. If entitled to an accounting:

   a. Whether there should be included in the gross income in such account the following 2 items:

      (1) Income from milo maize sold in the amount of $701.00

(2) Income from rental for grazing cattle on milo maize fields 585.00

b. Whether the account should include as charges to crop costs the following:

1946-1947		
1) Property Insurance	88.10	
2) Property Taxes	853.32	$ 941.42
1947-1948		
3) Property Insurance	61.71	
4) Property Taxes	817.08	
5) Milo Maize Direct	1,570.94	
6) Milo Maize Indirect	247.37	
7) Repairs and Maintenance —R. E.	976.80	
8) Village Repairs	384.62	
9) Water Tower Expense	218.01	
10) Village Maintenance	231.35	
11) Raised Ditches	136.59	
12) Maintain Roads	35.00	
13) Clear Land	129.41	4,808.88
1948-1949		
14) Property Insurance	$ 123.86	
15) Property Taxes	455.81	
16) Milo Maize Crop	358.99	

17) Repairs-R. E.	196.01	
18) Village Maintenance	139.20	
19) Salary and Wages—Officers	3,000.00	
20) New Fence	550.66	4,824.53
		$10,574.83

c. Whether the account should include the following charges for acreage rental:

(1) For 400 acres of milo maize	$8,000.00
(2) For 50 acres of carrots	1,000.00
	9,000.00

d. Whether the account should be charged with the cost of the following equipment:

M-5909 Buda Power Unit	$1,600.00
Gorman Pump No. 2	123.00
Farmall Model No. 2	1,384.04
M-6326 Motor	120.70
	$3,227.74

e. Whether the cost of John Deere Tractor F-837 in amount of $1771.76 should be credited with amount realized from sale of John Deere Tractor F-714, and whether such latter tractor should now be sold.

f. Whether the account should be given credit for the value of certain equipment charged to the account which equipment was on hand when the contract terminated.

g. Whether such account could be charged the so-called replacement cost of petitioner's equipment which charge peti- claimed to amount to $40,944.66

h. Whether the account should be charged with "dam and reservoir repairs" totalling 1,690.44

i. Whether the account could be charged with "Depreciation-Buildings and Irrigation system" totalling 7,841.19

j. If chargeable with foregoing item i, was such amount correct?

k. Whether the account could be charged with "Expense-Administration" totalling $10,403.84

l. If chargeable with foregoing item k, was such amount correct?

m. Whether account should be credited with ½ of bad debt recoveries in amount of 420.00

n. Whether Respondent's drawings as charged in said account were excessive by 469.00

o. Whether Respondent, in such account, should be given credit for the bonus called for in the 3rd paragraph of the contract, in the amount of 3,824.08

p. Whether the account should be given credit for ½ the value of inventory on hand on termination?

q. What the value of such inventory was.

r. Whether such account should be credited with ½ the amount of railroad claims collected.

s. What ½ the amount of such collected railroad claims were.

These issues were summarized in much the same fashion for the Trial Court, and such summary appears R. 328, and was introduced in evidence, R. 323.

To answer foregoing issues required unravelling what such charges and credits were for, how arrived at, and then applying the contract to them. No jury could have possibly done this satisfactorily.

APPENDIX B

1. *Kirby* v. *Lake Shore RR.*, 120 US 130, 4, 30 L. Ed. 569, 571:

> "The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties, constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story, Eq. Jur. Sec. 451."

2. Professor Pomeroy in 4 Pomeroy's Equity Jurisprudence (5th ed.) 1076, 1077 Sections 1420 and 1421 summarizes very clearly the law as to when jurisdiction in equity is invoked for an accounting in view of the unusual situation of equity and law having concurrent jurisdiction. Pomeroy states:

> "Sec. 1420. Origin of the Equitable Jurisdiction.—The action of account-render was one of the most ancient actions known to the common law. From the narrow scope and technical rules of this action, the inability of common-law courts to obtain a discovery from the defendant on his oath, the difficulty met with in cases of mutual and complicated accounts, and the impossibility of otherwise doing complete justice, it is easy to understand why the action

of account-render fell into disuse, and a jurisdiction in equity to entertain suits for an accounting grew up. The jurisdiction exists, therefore, and is well established; but the question arises, since there is a similar jurisdiction at law, when may a suit in equity for an accounting be brought?* * * It is not in every matter of account cognizable at law that the equitable jurisdiction will be exercised, the general rule being that a proper case is presented when the remedies at law are inadequate.

"Sec. 1421. Extent of the Equitable Jurisdiction; When Exercise.—The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant,—that is, where each of the two parties have received and paid on account of the other. The accounts must be mutual, as distinguished from matters of set-off, and accounts on one side only.

"2. Where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law. To determine what degree of complication is required before a court of equity will entertain jurisdiction for that reason, independent of other circumstances, the rule was established in England that the account should be so complicated that a court of law would be incompetent to examine it at *nisi prius* with the necessary accuracy. But under the present practice in England, matters of account may be referred to officers or referees, so that the rule as above stated can now hardly be followed.

The facts of each particular case should govern, and if it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction.

"3. Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account.* * *"

Professor Pomeroy's summary is, of course, completely supported by the decisions of this Court, and the body of Federal law generally.

3. In *Kilbourn* v. *Sunderland*, 130 U.S. 505, 514, 32 L. ed. 1005, 1009, this Court held:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, *is as efficient as the remedy which equity would confer under the same circumstances. The parties stood in a fiduciary relation towards each other*, and, in the course of the transactions between them, from thirty to forty different lots of ground were bought for the complainants in upwards of fifteen distinct purchases. *As to five of these purchases fraud is specifically charged.* A considerable amount of complainants' money was in defendants' hands, and a counterclaim was set up by them in relation to services performed in and about the care of a portion of the property purchased; services covering many payments for taxes, interest, etc.; making of loans and procuring renewals; receipts and advances. *The transactions were all parts of one general enterprise, and the claims of a character involving trust relations.* Be-

fore the severance of the connection between the parties, Kilbourn & Latta dissolved, and the amounts due from Kilbourn & Latta, if any, and from Latta alone, if any, to Sunderland and Hillyer or to Sunderland, and the offsets and counterclaims of Kilbourn & Latta, or of Latta, all sprang from one series of operations, and required an accounting on both sides; and that accounting, until disentangled by the investigation of the court, was apparently complicated and difficult. 'There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law.' (1 Story, Eq. Jur. Sec. 450); and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the supreme court of the District in sustaining the jurisdiction."

4. In *Goffe & Clarkener, Inc.* v. *Lyons Milling Co.*, 26 F. 2d 801, Judge McDermott, writing in the District Court on a motion to remove the case from the docket, goes exhaustively into the question "May equity decree an accounting, where there is but a single account, which is long and complicated and confusing?" After carefully reviewing the authorities the Court held, p. 804:

"The bill discloses that the account ran for a period of nine months; that there were a large number of both purchases and sales, and many

payments made by each party to the other; that the account is complicated and confusing; the tender amendment shows about four hundred separate argument, consisted of many pages of debits and credits. Transactions on the grain exchanges generally involve fractional cents; interest computations are correspondingly complicated. While an auditor may be called to assist a jury (In Re Peterson, 253 U.S. 300, 40 S. Ct. 543, 64 L. ed. 919), and is of great help in many cases, the responsibility still rests upon the jury; the auditor may be cross-examined, other evidence introduced, and other compilations presented. The allegations of the bill present a situation wherein it might be entirely impossible for 12 jurymen to do more than guess at the result, or select but one witness and blindly follow his calculations. Such a situation does not make for substantial justice; our system of jurisprudence is not so rigid and inelastic as to thrust such a gamble upon business men."

The 10th Circuit subsequently affirmed the case after decision on the merits, 46 F. 2d 241. This District Court opinion, in addition to being persuasive because of its careful analysis of the decisions, is also frequently cited as authoritative in subsequent opinions in Federal Courts on the same question. The reasons which Judge McDermott held, in the above quotation, to be controlling are the same reasons why in this case the accounting had to be by the Court and not a jury.

5. While not binding on this court, nevertheless, for further close analogy, the Court is referred to

the recent Missouri case of *Zickel* v. *Knell*, 210 SW 2d 59, 61, 62, 63, where the Missouri Court found equity jurisdiction to exist in an accounting suit such as this one on both the grounds of a complicated account and by reason of a fiduciary relationship.

In such Zickel case plaintiff entered into an agreement with defendants under which he was to sell commercial floor coverings, reecive a weekly salary, mileage for his car and 20% of the net profits on the contracts of sale made by him. Plaintiff set up a bookkeeping system to show costs of each job, but defendant's employees kept the books. Plaintiff, after 3 years of operation under this contract sued for accounting. Defendant counterclaimed for advances allegedly paid out exceeding plaintiff's share of profits. We quote from pages 61-2:

> "Defendants contend that there was no competent evidence to support the judgment and decree and say that there was no showing whatever of any ground for relief in equity. They claim plaintiff's suit was to recover a debt in a fixed amount on which they were entitled to a trial by jury. . . .
>
> "We think the evidence here was sufficient to show a basis for relief in equity. To determine the amount due plaintiff, either on the basis of his version of the agreement or defendant's, it was necessary to determine the profits on about 150 separate contracts bringing in gross proceeds of about $138,000.00 over a period of three years. This required an examination of the books kept by defendants which

plaintiff had not been permitted to see. Defendant's books showed the complete costs on these contracts and the profits could not be determined without them. Plaintiff had only cost sheets that he prepared from estimates and the various materials that would be used in connection with jobs. Final costs were determined from invoices from supply houses and work tickets turned in by workmen who made the installations, and other actual cost items. Plaintiff had the exact profit on only a limited number of contracts (the first thirteen) and estimated profits on the others on the basis of the average of these. Thus there was clearly a need for discovery and the complicated character of these accounts is self evident.

"Defendants contended that there was no fiduciary relation shown. The court found a joint venture in the nature of a partnership relation which would, of course, be sufficient (*Neville* v. *D'Oench*, 327 Mo. 34, 34 SW 2d 491). However, regardless of whether or not the evidence was sufficient to support such a finding, which we do not decide, there certainly was at least a sufficient relationship as principal and agent, with funds belonging to one party collected and held by the other, to establish a fiduciary relationship between them under the circumstances of this case."

6. In addition to foregoing authorities, the Trial Court, in its memorandum decision, appearing R. 79 to R. 84 made a careful analysis of the authorities and for such authorities, as well as the reasoning and findings of the Trial Judge, respondent respectfully refers the Court to same. As is apparent

from such opinion, the Trial Court was impressed with the fiduciary relationship between respondent and petitioner, and rightly so. Among other decisions the Trial Court relied upon *Elliott* v. *Murphy Timber Co.*, 117 Ore. 387, 244 Pac. 91, 48 A.L.R. 1043, 1046, (which respondent takes the liberty to quote from in view of its close analogy) wherein it was held:

> " '*Whatever their relation may have been*, their rights and liabilities rest upon their agreement, and *where a contract provides* as this does, *for payment by one party to another of profits received, it is the duty of the one receiving such profits to account to the other*, for otherwise there would be no way by which such party could determine whether there were any profits. *The duty to account arises whenever one party is in possession of profits to which another person is entitled to share, regardless of what their relationship may have been at the time the profits were earned.* When an employer has received profits in which, by the terms of his contract, an employee is entitled to share, it is as much his duty to account to the employee, as it would be if the relation of partners or joint adventurers existed between them.
>
> " 'The right to go into equity for an account is not confined to a partner. *Any employee paid by a share of the profits may maintain a bill for an account* though he is not a partner, since a court of law is unable to take such an account.* * *'"

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FILE
SEP 15
CHARLES ELMORE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1951

No. 784 73 1.

H. B. ZACHRY COMPANY, PETITIONER,

versus

T. N. TERRY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR FITH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENT'S REPLY BRIEF

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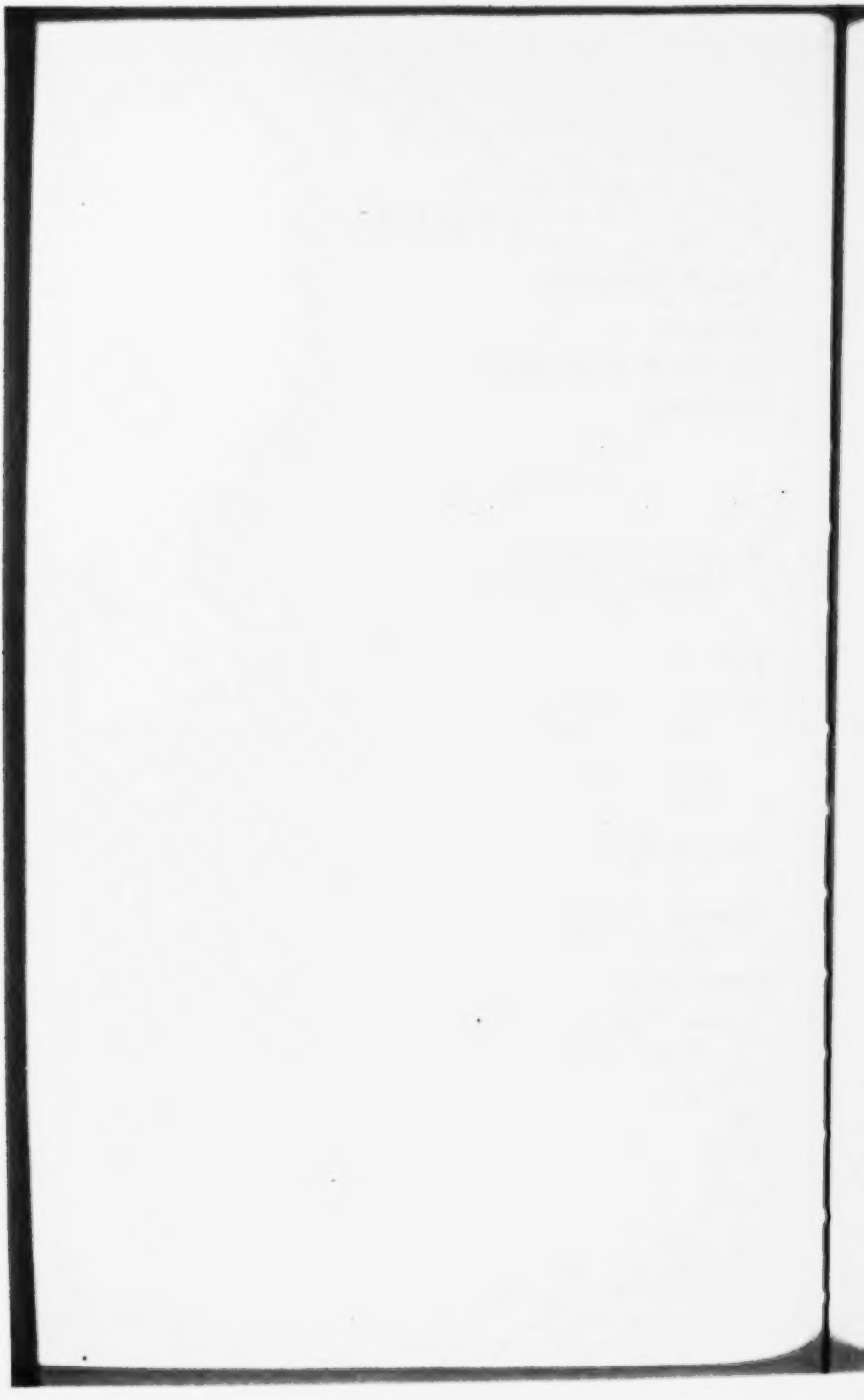

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STATEMENT

In keeping with Chief Justice Vinson's friendly advice given to the American Bar September 7, 1949, we shall not attempt to belabor the various points consigned to this Court by Respondent in its Reply Brief; we rather prefer to re-emphasize the tremendously important principles and broad import of the question submitted to this Honorable Court for final determination.

The question is repeated: Petitioner's constitutional right to trial by jury of all legal issues made, joined and determined in the action.

IMPORTANCE OF THE QUESTION

This is not an action where the litigant was permitted to have a jury, and upon conclusion of the evidence a verdict instructed for lack of controverted issues of fact; it is not an action wherein judgment was entered non obstante veredicto; it is an action on the contract with the questions and issues clearly drawn by the pleadings of the parties, supported by timely request for a jury, pursuant to Rule 38 of the Federal Rules of Civil Procedure, and a denial in the first instance of the *right* to trial by jury as at common law.

It would seem to be wholly unnecessary for this Court to look further into the Record than is necessary to find the pleadings of the parties and the Trial Court's findings of fact and conclusions of law, and only then to determine the issues involved in the action. With the issues drawn and determined, it then becomes a question of whether Petitioner was deprived of its constitutional right of trial by jury in "a civil action," and whether the question is of sufficient importance to warrant action by this Court in granting Petitioner's application for Writ of Certiorari.

Petitioner says its *right* to have the issues submitted to a jury was wrongfully foreclosed. Sufficiency of the evidence to warrant submission of the issues or questions to the jury is not the point. The situation in the instant case is more flagrant than one where a verdict is instructed, as was the case in *Barnett-New England* (5th Cir.), discussed at page 12 of the Petition for Writ of Certiorari. There it was determined that the *right* of trial by

jury was wrongfully wrested from Mrs. Barnett. The Trial Court, treating the case as one in equity without regard to legal issues, and taking the case from the jury and making its own findings of fact and conclusions of law, made it useless for the Appellate Court to search the Record for evidence in favor of either party — it was simply error to deprive Mrs. Barnett of her right of trial by jury in the first instance. It was therefore rightly concluded to send the case back for a new trial without attempting to weigh the facts found by the Trial Court, since the Trial Court is not authorized to make findings of fact in a jury case.

Your Petitioner was actually deprived of its *right* to have a jury determine the questions and issues formulated by the pleadings, and it thus becomes unnecessary for this Court to pass on the weight or tendencies of the evidence. It would therefore seem proper for this Court to grant the Writ of Certiorari and summarily reverse the judgment.

Importance of the question presented cannot be overstressed.

The Constitution of the United States as originally drafted and submitted to the various State Legislatures for approval and adoption omitted, among other things, provision for trial by jury in civil cases. This omission precipitated one of the bitterest attacks that was made upon the draft of our Constitution. It provoked Jefferson, Patrick Henry, Madison and other statesmen to raging

attacks against the Constitution as originally submitted. Alexander Hamilton carried the banner for the Federalist, who urged adoption of the Constitution as originally drafted. His answer to the critics on the question of trial by jury in civil cases was to the effect that since the Constitution made provision for trial by jury in criminal cases, the right of trial by jury in civil cases was implied. His argument in support of this contention is fully set forth in Federalist Paper No. 88. This argument was futile. The Constitution was finally adopted only on condition that the amendments embodying a bill of rights should follow immediately after its adoption.

Justice Story, writing at a later period, expressed the universal sentiment of the colonies: "It (the Seventh Amendment) is a most important and valuable amendment and places upon the high ground of constitutional right the inestimable privilege of trial by jury in civil cases—a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." (Joseph Story, Commentaries on the Constitution (Cambridge, Mass.: Brown, Shattuck & Co., 1833) Vol. III, p. 633.)

In *Parsons v. Bedford*, 3 Pet. (U. S.) 433, 446, 7 U. S. (L. Ed. 732), Justice Story observed:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed,

incorporated into and secured in every State Constitution in the Union; and it is found in the Constitution of Louisiana. *One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases.* Since the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

It may be true, as pointed out by Respondent at page 21 of his Reply Brief, that the Federal Rules of Civil Procedure did not enlarge the right of trial by jury in civil cases. Be that as it may, the right of trial by jury in civil cases, as far back as we can remember, has always been as big as life, and the Federal Rules of Civil Procedure as we understand them merely removed old barriers that stood in the way of enjoyment of that almost sacred right and privilege of the American people.

The Rules of Civil Procedure abolished equity cases and law cases. It is the issues, not the form of case, that now determine the method of trial. *Beaunit Mills, Inc. v. Fabric Sales Corp.*, 124 F.2d 563, 565-566; Petitioner's Application for Writ, page 15, 18.

CONCLUSION

It is our sincere belief that if the principles and reasonings set forth in Respondent's Reply Brief are applied to the instant case, they must run head-on with the Seventh Amendment to the Constitution, and Rule 2 and Rule 38 of the Federal Rules of Civil Procedure.

Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted and the case summarily reversed and remanded.

Respectfully submitted,

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Attorneys for Petitioner.

33

OCT 31 1951

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1951

No. [redacted] 73

H. B. ZACHRY COMPANY, PETITIONER,

versus

T. N. TERRY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1951

No. 784

H. B. ZACHRY COMPANY, PETITIONER,

versus

T. N. TERRY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR FIFTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that this Court grant rehearing of its order of October 13, 1952, denying petition for writ of certiorari in the cause of H. B. Zachry Company v. T. N. Terry, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the petition filed May 19, 1952 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

I

Since the filing of the petition and subsequent to the Court decisions cited in the petition under Reasons for Granting the Writ, an Appellate Court decision has been rendered in the case of *Ripling v. Superior Court in and*

for Los Angeles County, et al, reported in 247 P.2d 117 (advance sheet), which decision clearly presents and determines the question put before this Honorable Court in the petition.

This decision clearly demonstrates:

1) The principles upon which the petition for certiorari in the instant case was filed;

2) The importance of the question submitted to this Honorable Court;

3) The conflict of the decision of the Court below in the instant case with the decisions of this Honorable Court and other Courts of Appeals cited in the petition;

4) The confusion that exists at the bar concerning the right of trial by jury in civil cases as that right existed at common law where the action involves an accounting;

5) The reason for the confusion.

Petitioner submits that this decision, involving as it does the pronouncement of the right of trial by jury in civil cases under the Constitution of the State of California, as that right existed at common law, is in principle on all fours with the question submitted to this Honorable Court by Petitioner, because:

1) The California Constitution, Article I, Section 7; Article I, Section 3 (1849), preserves to litigants the right to trial by jury as it existed at common law in much the same language as the right to trial by jury in civil cases is preserved by the Seventh Amendment to the Constitution of the United States.

2) The action there as here involved an action at law in the nature of the common law action of account.

3) The action there as in the instant case was for an accounting, money judgment, and declaration of a trust.

4) Plaintiff there as here voluntarily adopted the theory that the case was equitable in nature and therefore triable as a court action without the intervention of a jury, and convinced the Trial Court that the case should be set for trial before the Court without a jury. Defendant thereupon sought and obtained a writ of prohibition against the Trial Court prohibiting it from proceeding to trial without a jury, on the principal ground that the action historically was one at common law comparable to the old common law action of account. And notwithstanding that a court of equity could likewise grant relief in such a case, it was still a common law action entitling the defendant to a trial by jury under the Constitution of the State of California.

5) It was the contention of plaintiff in that case, as is Respondent's contention in the instant case, that the action was to enforce a trust, for money, and for an accounting, thereby making the case triable solely in equity prior to 1850. (Here, prior to the Federal Rules of Civil Procedure.)

6) The Court in that case made a fine analysis of the decisions relating to the old common law action of account as distinguished from purely equitable actions, and pointed up the reason for the confusion that exists when attempts are made to distinguish between those actions under facts and circumstances such as we here now are dealing with.

Petitioner submits the California Appellate Court decision to this Honorable Court for consideration, because it appears to be exactly in point on the question submitted by Petitioner and perhaps better spells out than has been done before the conflict existing between the decision in the instant case and those of other Courts of Appeals cited in the petition.

A copy of the opinion of the District Court of Appeal, Second District, Division 3, California, in the *Ripling* case as reported in 247 P.2d 117, appears in the Appendix to this Petition for Rehearing.

However, a summary of that decision as given in 21 The U. S. Law Week 2086 is here set forth as follows:

> "It is fundamental that the California Constitution preserves to litigants the right to jury trial as it existed at common law in 1850. The plaintiff insists that this is an action to enforce a trust and therefore would have been tried solely in equity prior to 1850.
>
> "A fundamental error in this position results from a failure to note the historical background of the remedies applicable to the types of relationship alleged to exist here. The plaintiff has assumed that since it is in the nature of a trust relationship only courts of equity would enforce the trustee's obligation. While it is true that usually only equity took cognizance of trust matters, there exists one class of cases founded on the old common law action of account which were triable either in law or in equity. According to the Restatement of Trusts, Section 198(1) the guiding principle is that 'if the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.'
>
> "Of course, the beneficiary in such a trust situation can maintain a bill in equity if he chooses. However, the fact that trial by jury is jealously preserved as a matter of right dictates that the mere existence of a remedy in equity cannot operate to defeat a right to proceed at law. It is only where the issues to be tried are exclusively equitable in nature that a litigant is deprived of the right to a jury trial."

II

The question submitted on the right of trial by jury in civil cases involving settlement of accounts and other so-

called equitable issues, continues to be of large practical importance in trial procedure in the United States District Courts.[1] Unless the question is finally put to rest by this Honorable Court, innumerable cases will find their way through expensive appeals to this Court on account of the conflict between the decision of the lower Court in the instant case and those of other Courts of Appeals on the question of trial by jury in civil cases as at common law under the Seventh Amendment to the Constitution of the United States, and Rules 2 and 38 of the Federal Rules of Civil Procedure.

Petitioner further submits that unless the question is put to rest by this Honorable Court, the decision of the lower Court in the instant case will constitute a dangerous precedent, because the Court there held that "in a civil action for an accounting the jurisdiction at law and in equity is concurrent," yet in effect held that because of the accounting feature injected into the case, Petitioner's right to trial by jury of all legal issues as at common law was sterilized. If, as held by the Court, the jurisdiction at law and in equity is concurrent in the instant case, such jurisdiction must result from the old common law action of account, and Petitioner is entitled to a jury trial of the legal issues made and joined in the pleadings, as demanded under Rule 38 of the Federal Rules of Civil Procedure, and the Seventh Amendment to the Constitution of the United States. Furthermore, unless that conflict is resolved, an unjustifiable discrimination between persons in different jurisdictions will result.

[1]In addition to the cases referred to in the petition for writ of certiorari heretofore filed as being in conflict with the instant decision, the following are noted: *Bruckman v. Hollzer* (Ninth Circuit) 152 F.2d 730; *Hargrove v. American Cent. Ins. Co.* (Tenth Circuit) 125 F.2d 225; *Keene v. Hale Halsell Co.* (Fifth Circuit) 118 F.2d 332.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

_____
Attorney for Petitioner.

I, Chester H. Johnson, attorney of record for Petitioner, certify that two copies of the above and foregoing Petition for Rehearing has this day of October, 1952, been addressed to G. C. Mann and George D. Byfield, attorneys for Respondent, at Laredo, Texas, properly stamped, and deposited in the United States Mail.

_____
Attorney for Petitioner.

APPENDIX

(247 P.2d 117)

CIV. 19079

RIPLING
V.
SUPERIOR COURT
IN AND FOR
LOS ANGELES
COUNTY, ET AL

DISTRICT COURT
OF APPEAL,
SECOND DISTRICT,
DIVISION 3,
CALIFORNIA

July 24, 1952.
As Corrected Aug. 5, 1952.
Rehearing Denied Aug.11, 1952.

Mildred Ripling, also known as Mrs. William J. Ripling, and William J. Ripling petitioned for a writ of prohibition to prohibit the Superior Court of the State of California, in and for the County of Los Angeles, Robert H. Scott, J., from proceeding without a jury in a case brought against the Riplings in that court. The District Court of Appeal, Shinn, P. J., held that the action was one at law.

Petition granted.

Mildred Ripling and William J. Ripling seek a peremptory writ prohibiting respondent court from proceeding without a jury in the case of Norton v. Ripling (L. A. Super. Ct. No. 556274). It is not questioned that prohibition is a proper remedy.

On February 25, 1949, Richard Norton, as guardian of the estate of Thomas J. Norton, incompetent, filed an action against Mildred Ripling, sister of Thomas. (Thomas died in 1950 and Richard now appears as administrator.)

The complaint was in two counts, the first pleading facts, the second a common count for money had and received. In substance the first count alleged that between January 1942 and January 1945 Thomas J. Norton had paid over and delivered to defendant "for safekeeping" $21,849.65; that defendant "orally promised and agreed to hold said moneys in safekeeping for plaintiff"; that defendant paid $4,172.88 from the sum for plaintiff's use; that the guardian had made a demand for the balance but defendant refused to pay. Prayer was for judgment of $17,676.77, costs and general relief. Amended complaints were successively filed in April 1949, May 1949, August 1951 and September 1951. In some of these (including the fifth) defendant William Ripling, husband of Mildred, was joined. The last complaint omitted the common count, elaborated the "safekeeping" allegations to one, of trust, and added allegations on information and belief that additional sums had been entrusted to defendants. The prayer of this complaint was for money, accounting and further relief. The answer to the fifth complaint admits receipt of $20,097.65, denies receipt of additional sums, and affirmatively alleges repayment to Thomas J. Norton of all sums entrusted.

After filing the first complaint in February 1949, plaintiff attached real property and two bank accounts belonging to defendants. Later the property was sold and there remains under attachment one bank account with a balance of $1,106.12, one bank account with a balance of $10,000 and a trust deed note for $13,500. In the affidavit for attachment plaintiff stated defendants are indebted to him upon an express contract for the direct payment of money "to wit money had and received."

In June 1949 the cause was set for trial on the jury calendar *at plaintiff's request* but later went off calendar

by stipulation. In September 1951, defendant filed a request for trial and demanded a jury trial. Plaintiff later filed a memorandum for setting on the nonjury calendar, and the case was set on the jury calendar. Before trial, the court granted plaintiff's motion for trial by the court and granted a continuance. On defendant's application an alternative writ issued from this court.

(1-4) It is fundamental that the California Constitution preserves to litigants the right to jury trial as it existed at common law in 1850. Calif. Const., art I, sec. 7; Calif. Const. 1849, art. I, sec. 3; People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832; Farrell v. City of Ontario, 39 Cal. App. 351, 356, 178 P.740. "It is a right 'secured to all,' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several States of the Union." Field, C.J., in Koppikus v. State Capitol Commissioner, the "gist of the action" as framed by the pleadings is such that the issues raised would have been triable on the law side before 1850, a trial by jury is a matter of right. Grossblatt v. Wright, 108 Cal. App. 2d 475, 483, 239 P.2d 19. As thus presented, the question is an historical one. Although the common law forms of action are abolished and Law and Equity are united in one forum, the problem of right to a jury trial must still be approached in the context of 1850 common law pleading. Thus, if the gist of the action is like common law debt, a jury trial must be granted when demanded. Grosblatt v. Wright, supra. And, even though the case involves equitable principles if it is one where the common law courts could and would grant relief, trial by jury is preserved. Farrell v. City of Ontario, supra, 39 Cal. App. 351, 178 P.740; Mortimer v. Loynes, 74 Cal. App. 2nd 160, 168, 168 P.2d 481. The legislature may not, directly, or in the guise of procedural

changes or changes in remedy, deprive a litigant of a jury in a case formerly triable at law. People v. Kelly, 203 Cal. 128, 133, 263 P.226. People v. One 1941 Chevrolet Coupe, supra, 37 Cal. 2d 283, 299, 231 P.2d 832. Likewise, a litigant may not by pleading legal conclusions sterilize the right to a jury trial as this question is determined from a consideration of "all the *facts* of the case." Hutchason v. Marks, 54 Cal. App. 2d 113, 128 P.2d 573, 576. Thus the question presented here is: On the basis of the facts alleged in the fifth amended complaint and answer thereto, and the issues joined, is the case one which would have been triable at law before 1850?

Stripped of legal conclusions and reduced to ultimate facts the fifth complaint alleges that Mildred Ripling orally agreed to receive money given her by her brother Thomas J. Norton and to hold the funds until directed by him to pay them to him or for his benefit. It further alleges a demand for return of the remaining funds and refusal by Mildred Ripling to pay. The answer admits all of this except the refusal to pay, alleging that full payment had been made. There is a further controversy as to the amount turned over to Mildred. It thus appears there is one issue in the case, namely, whether all the funds Mildred received under the oral agreement were used for the benefit of Thomas J. Norton or returned to him. The prayer is for an accounting, money judgment and declaration of a constructive trust in money.

The real party in interest insists, and the respondent court agreed, that this is an action to enforce a trust and thus would have been tried solely in equity prior to 1850. Petitioner insists the action is one for money and triable by the common law courts. On analysis of the pleadings and the issues framed we agree with petitioner.

(5) A fundamental error in the position of plaintiff results from a failure to note the historical background of the remedies applicable to the type of relationship alleged to exist between defendant Mildred Ripling and Thomas Norton. Plaintiff has assumed that since it is in the nature of a trust relationship only courts of equity would enforce the obligation of the trustee. While it is true that usually only equity took cognizance of trust matters, there exists one class of cases founded on the old common law action of account which antedated the chancellor and which were triable either in law or equity. "The idea underlying the action of account was that the defendant was entrusted with property as a fiduciary . . . for which he was under an obligation to account." 1 Scott on Trusts 82. "If A gave money to B to be kept and returned to A, A could bring an action of account against B." Id. p.85. "As the action of account became obsolete and the actions of debt and *indebitatus assumpsit* were stretched to occupy at least a part of the field occupied by the action of account, the court of chancery began to take jurisdiction . . . Today it may be said, therefore, that a trust is enforceable only in equity, *except where the action of account lay at common law; and that where account lay the jurisdiction of equity is concurrent with that of the common-law courts which allow an action of debt or indebitatus assumpsit* or the modern code equivalent of these actions." Id. p.84. As presently restated the guiding principle is that "if the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." Rest., Trusts, sec. 198(1); see also Scott on Trusts, sec. 198.1.

Although there is some confusion in the English cases and texts, it appears that they support the position taken

by Professor Scott and the Restatement of Trusts. Sutton says of the old action of account: "Though this action lay at common law, we need only mention it to say that it is rarely met with in more modern times, owing to the substitution of other remedies for it. In the simpler cases such an action as assumpsit for money had and received was found to be sufficient, while in the more complicated cases the tendency was to proceed in Chancery, owing to the powers of that court to enforce discovery and the like, which the Courts of Common Law did not possess." Sutton, Personal Actions at Common Law, p.46. A typical case involving this action is Godfrey v. Sanders, (1770) 3 Wils, K.B. 73, 94, 95 Eng. Rep. 940, 952. In that case plaintiff consigned coral beads to defendant in the East Indies which were to be sold and diamonds returned in payment. Defendant had sold the beads but had not remitted the diamonds, and plaintiff brought an action of account. The court held account would lie. Modernly this would be an action to enforce a constructive trust, one thought usually to lie only in equity. But, since the diamonds were the equivalent of money, the action would be one for money the trustee was immediately to pay over and the case is within Scott's statement. A somewhat narrower view than that expressed by Scott and Sutton is found in 33 Halsbury's Laws of England (2d Ed.) where it is said at page 305: "A Breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction." Citing Co. Litt. 2726; Sturt v. Mellish, (1743) 2 Atk. 610, 612, 26 Eng. Rep. 765; Allen v. Imlett and Nicholls, (1817) Hold 641, 171 Eng. Rep. 370. But in a footnote to the above statement it is said (p. 306): "But an action for money had and received lies against a trustee on an admission that a balance belonging to the beneficiary is in his hands." Citing Roper v. Holland,

(1835) 3 AD. & E. 99, 111 Eng. Rep. 351; Cummins v. Cummins, (1845) 3 Jo. & Lat. 64. Three cases serve to clarify the principle and point out some of the confusion: Sturt v. Mellish, supra; and Foley v. Hill, (1848) II H.L.C. 28, 1 Eng. Rep. 1002. In the Sturt case, which involved a constructive trust, the Chancellor refused to refer the matter to a master for an accounting and said (p. 612): ". . . a trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this court (but Lord Hobart, it seems, was of opinion, that an action would lie against a trustee at common law. 1 Eq. AB. 384, (D.) 1, note) . . ." In Roper v. Holland, supra, it was held that assumpsit would lie against a trustee for money as to a sum currently due to plaintiff as beneficiary of the trust. In Foley v. Hill, supra, funds of the plaintiff had been placed with defendant, who was a private banker, interest to be given and the sums to be paid over on request. The Lord Chancellor affirmed the lower court's dismissal of the bill for an accounting, saying that where the account was simple equity would not take jurisdiction. Furthermore, in 1 Halsbury's Laws of England, 53 (2d Ed.) it is said that " *'special assumpsits'* lay . . . to account . . . for money . . ." From the foregoing it appears that the law courts would entertain an action against a trustee where he had a duty immediately to pay over money to the beneficiary.

Many cases in the United States indicate that sec. 198 of the Restatement of Trusts correctly states the course of the common law as that law is understood in the several States of the Union. Carl Byoir & Associates v. Tsune-Chi Yu, 2 Cir., 1940, 112 F.2d 885, 886; Newlin v. Newlin, 1944, 114 Ind. App. 574, 52 N.E. 2d 503, 505; Cavanagh v. O'Connor, 1920, 189 Iowa 171; 176 N.W. 881; Capraro

v. Proprati, 1940, 127 N.N. Eq. 419, 13 A.2d 318, 321; Conner v. Fisher, 1934, 169 Okl. 197, 36 P.2d 501; Dieter v. Scott, 1939, 110 Vt. 376, 9 A.2d 95, 100. The Restatement of Trusts rule is also supported by California authorities. It was recognized but held not applicable to the facts (there was no immediate duty to pay over money) in Lane v. Whitaker, 50 Cal. App. 2d 327, 331, 123 P.2d 53. In Austin v. Wilcoxson, 149 Cal. 24, 26, 84 P. 417, it was held that an action similar to that at bar was one at law, not in equity, and no special findings were required.

In Conner v. Fisher, supra, 36 P.2d 501, the court said: "This is an action at law in the nature of the common-law action of account; the plaintiff alleging that the defendant who operated the property involved as trustee failed to account to the plaintiff, the beneficiary, for the proper income of the property. The petition prays for judgment in the approximate sum of $15,000. The trust had already been determined, and the property sold; nothing remaining to be done except make a final settlement, upon which the parties could not agree . . . This is a suit for the recovery of money, and is properly a jury case . . ."

In Austin v. Wilcoxson, supra, 149 Cal. 24, 84 P. 417, plaintiff alleged one of her granduncles transferred $75,000 in trust for her to another granduncle, the sum to be paid to plaintiff on the trustee's death. The suit was brought against the executor of the trustee's estate and plaintiff contended that as it was an action to enforce a trust and in equity specific findings should have been made. In denying this contention, holding it was a law action, the court said, 149 Cal. at page 26, 84 P. at page 417: "We think, however, that plaintiff misconceives the legal effect of her complaint. It is not an action to declare and enforce a trust. She sues at law to recover

moneys which she alleges have come into the hands of the defendant and which upon her demand he has refused to turn over to her. Her action may indifferently be called one in trover, in assumpit, or for money had and received. It is true that to make out her title to the money she alleges that it was given by one of her granduncles to another granduncle in trust for her, but the allegation as to this defendant's connection with the fund is simply that he 'took possession of it' and refuses after demand to pay it over. The same allegation would be good against a thief who had actually stolen the money, and assuredly it cannot be said that a demand made upon one whom it is alleged has wrongfully taken and wrongfully holds money constitutes an equitable action to enforce an express trust. The enforcement of a trust in equity has in contemplation the terms, conduct, and management of the trust, the settlement of the trustee's accounts, compensation to the trustee, the order of payment over and his discharge from his trusteeship. None of these matters are here in contemplation . . . Equity will, of course, enforce a trust against the executor of the deceased trustee, (Walkerly v. Bacon's Executors, 85 Cal. 137, 24 P. 638; McGrath v. Carroll, Executor, 110 Cal. 79, 42 P. 536) but such is not the action here brought."

The question of a jury trial in a suit against a trustee who fails to deliver the trust fund as required was also raised in Dettenborn v. Hartford-Nat. Bank & Trust Co., 1936, 121 Conn. 388, 185 A. 82. At page 84 of 185 A. the court said: "An action by a beneficiary claiming damages from a trustee for his breach of duty in refusing to pay or deliver the trust fund . . . is one at law, triable by jury . . ."

(6) On the basis of the foregoing analysis of the law applicable to the present case it appears that it would have

been triable to a law court and there is thus a right to a jury trial. Plaintiff, however, cites four California cases which he contends conclusively establish the proposition that there is no right to a jury trial in cases like the present. Lane v. Whitabke, 50 Cal. App. 2d 327, 123 P.2d 53; O'Dea v. Hibernia Savings & Loan Soc., 119 Cal. App. 622, 7 P.2d 318; Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589; and Woolsey v. Woolsey, 121 Cal. App. 576, 9 P.2d 605. It is significant that none of these cases discussed the possible application of the old common law action of account and none involved a situation where the alleged trustee admitted the funds were held for the use of plaintiff or plaintiff's predecessors in interest; all were thus actions to declare a trust and clearly cognizable only in equity. Our own case is not for the declaration of a trust, existence of which the defendant admits, but presents the simple question whether trust money is still held by the trustee. Under the issues the balance, if any, is admittedly payable to plaintiff. The distinguishing feature between suits against the trustee cognizable only in equity and those which may be brought at law is, as stated in the Austin case, 149 Cal. at page 26, 84 P. at page 418, that "(t)he enforcement of a trust in equity has in contemplation the terms, conduct, and management of the trust, the settlement of the trustee's accounts, compensation to he trustee, the order of payment over and his discharge from his trusteeship. None of these matters are here in contemplation." The same is true of the present case and of any passive trust of money to be paid over at the request of the beneficiary. The common law courts took jurisdiction of cases of this type in which there was no need for the exercise of equity jurisdiction.

(7, 8) Although the present action is one which arises whether it could also be brought in equity and deprive de-

fendant of a jury trial. That there may be concurrent jurisdiction is well settled, and in such cases a right of election exists. The converse of the situation before us has frequently been considered and it has been said "(t)here is a difference of opinion on the question whether, where the beneficiary of a trust can maintain an action at law is an adequate remedy, it is an exclusive remedy and the beneficiary cannot maintain at his option a suit in equity against the trustee. In some cases it has been held that the remedy at law is exclusive. But the better opinion is that the beneficiary can maintain a bill in equity if he chooses." Scott on Trusts, sec. 198.3; 171 A.L.R. 429; see, e.g. Ramsey v. Ramsey, 351 Pa. 413, 41 A.2d 559, 171 A.L.R. 425, and People v. Houghtaling, 7 Cal. 348. Both the Ramsey and Houghtaling cases involved trusts of money (the first express, the other constructive) and were factually similar to the present case. In both of these cases and in the cases cited by Scott, supra, and in the annotation 171 A.L.R. 429 it was held that a bill in equity could be maintained despite the fact an action at law would have been an adequate remedy. The fact that trial by jury is jealously preserved as a matter of right dictates that the mere existence of a remedy in equity cannot operate to defeat a right to proceed at law. It is only where the issues to be tried are exclusively equitable in nature that a suitor is deprived of the right to a jury trial. Those that are legal in nature are triable to a jury. Connell v. Bowes, 19 Cal. 2d 870, 123 P.2d 456; Hutchason v. Marks, supra, 54 Cal. App. 2d 113, 128 P.2d 216, 234, 132 P.2d 297; Farrell v. City of Ontario, supra, 39 Cal. App. 351, 178 P. 740.

(9, 10) It is not open to question that jury trial was a matter of right if the action is at law, even if it could have been brought in equity. Allegations that Mildred

Ripling received the money "in trust" and "for safekeeping" do not change the essential nature of the action nor does the allegation that plaintiff is uncertain as to the amount thus received. At one stage of the proceedings plaintiff obtained an attachment upon a claim based upon express contract and for money had and received. At another stage he objected to a jury trial upon the ground that he is seeking to have the court declare a trust in his favor. We hold that he has elected to proceed at law. A judgment is sought for money presently due; the terms of the alleged trust and the duties of Mildred Ripling are not in dispute; an attachment is outstanding, and a court of law can grant plaintiff complete relief as effectively as equity. Applicable here is the principle stated in Mortimer v. Loynes, 74 Cal. App. 2d 160, 168, 168 P.2d 481, 486. "None of the extraordinary powers of a court of equity are required in order to give plaintiff the relief that he seeks. A court of law can afford complete relief. It is thus apparent that this action is one at law."

The issues presented by the pleadings are triable at law, and to a jury, pursuant to the demands of petitioners.

Let a peremptory writ issue.

WOOD and VALLEE, JJ., concur.